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REPORTS OF CASES

DECIDED BETWEEN

NOVEMBER 13, 1981 and MARCH 25, 1982

IN THE

Supreme Court of Nebraska

SEPTEMBER TERM 1981 and JANUARY TERM 1982

VOLUME CCX

DONALD C. PATTON

OFFICIAL REPORTER

PRIESMAN GRAPHICS

OMAHA, NEBRASKA

1983

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By Donald C. Patton, Reporter of the Supreme Court

For the benefit of the State of Nebraska

SUPREME COURT

DURING THE PERIOD OF THESE REPORTS

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JUDICIAL DISTRICTS AND DISTRICT JUDGES

Number of District	Counties in District	Judges in District	City
First	Johnson, Pawnee, Nemaha, and Richardson	Robert T. Finn	Tecumseh
Second	Sarpy, Cass, and Otoe	Ronald E. Reagan	Papillion
		Raymond J. Case	Plattsmouth
		George H. Stanley	Papillion
Third	Lancaster	Samuel Van Pelt	Lincoln
		William D. Blue	Lincoln
		Dale E. Fahrnbruch	Lincoln
		Donald E. Endacott	Lincoln
		Bernard J. McGinn	Lincoln
Fourth	Douglas	Donald J. Hamilton	Omaha
		James A. Buckley	Omaha
		Theodore L. Richling	Omaha
		Samuel P. Caniglia	Omaha
		John E. Clark	Omaha
		John T. Grant	Omaha
		James M. Murphy	Omaha
		Jerry M. Gitnick	Omaha
		Paul J. Hickman	Omaha
		Keith Howard	Omaha
		Robert V. Burkhard	Omaha
		Stephen A. Davis	Omaha
Fifth	Hamilton, Polk, York, Butler, Seward, and Saunders	William H. Norton	Osceola
		Bryce Bartu	Seward
Sixth	Burt, Thurston, Dodge, and Washington	Mark J. Fuhrman	Fremont
		Darvid D. Quist	Blair
Seventh	Fillmore, Saline, Thayer, and Nuckolls	Orville L. Coady	Hebron

JUDICIAL DISTRICTS AND DISTRICT JUDGES

Eighth	Dakota, Dixon, and Cedar	Francis J. Kneifl	Dakota City
Ninth	Knox, Antelope, Cuming, Pierce, Madison, Stanton, and Wayne	Merritt C. Warren Richard P. Garden	Creighton Norfolk
Tenth	Adams, Clay, Phelps, Kearney, Harlan, Franklin, and Webster	Bernard Sprague William G. Cambridge	Red Cloud Hastings
Eleventh	Hall and Howard	Joseph D. Martin Richard L. DeBacker	Grand Island Grand Island
Twelfth	Sherman and Buffalo	DeWayne Wolf	Kearney
Thirteenth	McPherson, Logan, Lincoln, Dawson, Keith, Arthur, Grant, Hooker, and Thomas	Hugh Stuart Keith Windrum	North Platte North Platte
Fourteenth	Chase, Hayes, Frontier, Furnas, Red Willow, Hitchcock, Perkins, Gosper, and Dundy	Jack H. Hendrix	McCook
Fifteenth	Brown, Keya Paha, Boyd, Rock, Holt, and Cherry	Henry F. Reimer	O'Neill
Sixteenth	Sheridan, Dawes, Box Butte, and Sioux	Robert R. Moran Paul D. Empson	Alliance Chadron
Seventeenth	Scotts Bluff, Morrill, and Garden	Alfred J. Kortum Robert O. Hippe	Gering Gering
Eighteenth	Jefferson and Gage	William B. Rist	Beatrice
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CUMULATIVE LIST OF CASES DISPOSED OF WITHOUT OPINION

September 1981 and January 1982 Terms

No. 43659: **City of Columbus v. Olsan.** Motion and stipulation for dismissal of appeal allowed; appeal dismissed; each party to pay own costs.

No. 43763: **Walker's, Inc. v. Board of Equalization.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 43787: **Brabec v. School District No. 26.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 43823: **State ex rel. NSBA v. Hays.** Order of indefinite suspension entered.

No. 43881: **Nebraska State Council of Local Unions v. Dakota County.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 43883: **McDonald v. First Mid America.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 43894: **Stokke v. Burden.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 43954: **State v. Kincaid.** Motions of appellant for rehearing and for stay of mandate overruled; motion of Shrout for leave to withdraw as counsel sustained.

No. 44025: **Hudson v. Snyder Industries, Inc.** Stipulation for dismissal of appeal allowed; appeal dismissed with prejudice at costs of appellant.

No. 44115: **State v. Kocontes.** Affirmed; see Rule 20.

No. 44119: **State ex rel. NSBA v. Thierstein.** By order of the court respondent is indefinitely suspended until further order of the court.

No. 44151: **State v. Crisp.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44161: **State v. Holbert.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44164: **Fugit v. County of Sarpy.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of

appellant.

No. 44167: **In re Interest of Williams.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 44181: **State v. Welch.** Affirmed; see Rule 20.

No. 44189: **City of Grand Island v. Hatfield.** Joint motion for dismissal of appeal sustained; appeal dismissed; each party to pay own costs.

No. 44205: **Cook v. Cook.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 20-A(2).

No. 44208: **Stater v. Thomas.** Affirmed; see Rule 20.

No. 44215: **Johnson v. Holdrege Coop. Equity Exchange.** Stipulation for dismissal of appeal allowed; appeal dismissed; each party to pay own costs.

No. 44225: **Design Engineering, Inc. v. Citta.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 20-A(2).

No. 44231: **State v. Pass.** Affirmed; see Rule 20.

No. 44270: **State v. Robinson.** Affirmed; see Rule 20.

No. 44293: **Ho-Ott-Schju Land Co. v. City of Grand Island.** Motion of appellee for summary dismissal sustained; appeal dismissed; see Rule 20-A(1).

No. 44294: **Bosselman v. City of Grand Island.** Motion of appellee for summary dismissal sustained; appeal dismissed; see Rule 20-A(1).

No. 44299: **State v. Williams.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44308: **State v. Welch.** Affirmed; see Rule 20.

No. 44310: **State v. Kusik.** Affirmed; see Rule 20.

No. 44320: **State v. Bear.** Affirmed; see Rule 20.

No. 44328: **Hansen v. Sandhill Implement, Inc.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 44331: **Schneider v. Ball Real Estate Company of Kearney.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 20-A(2).

No. 44342: **State v. Richardson.** Dismissed for failure to file briefs.

No. 44347: **State v. Franklin.** Affirmed; see Rule 20.

No. 44348: **Bruner v. Bruner.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 44371: **State v. Sexton.** Affirmed; see Rule 20.

No. 44375: **State v. Eberhart.** Affirmed; see Rule 20.
No. 44376: **State v. Eberhart.** Affirmed; see Rule 20.
No. 44377: **State v. Weaver.** Affirmed; see Rule 20.
No. 44378: **Leffers v. Bob Sheckler Chevrolet, Inc.** Dismissed for failure to file briefs.
No. 44379: **State v. Mingus.** Order dismissing appeal entered.
No. 44383: **State v. Schuller.** Affirmed; see Rule 20.
No. 44385: **State v. Wolverton.** Affirmed; see Rule 20.
No. 44386: **State v. Smith.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).
No. 44391: **State v. Brown.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).
No. 44394: **Jerome v. Tiger, Inc.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.
No. 44396: **State ex rel. NSBA v. Fast.** Order of disbarment entered.
No. 44397: **Creighton-Omaha Regional Health Care Corp. v. County of Douglas.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.
No. 44399: **State v. Hernandez.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).
No. 44427: **State v. Stimple.** Affirmed; see Rule 20.
No. 44428: **State v. Ropggensee.** Affirmed; see Rule 20.
No. 44443: **State v. Bohac.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.
No. 44450: **State v. Harig.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 20-A(2).
No. 44455: **Sampy v. Sherbeck.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.
No. 44458: **State v. Bluebird.** Affirmed; see Rule 20.
No. 44463: **In re Interest of Beaugard.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.
No. 44473: **Peterson v. Kirwan.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.
No. 44476: **State v. Bohac.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of

appellant.

No. 44486: **David City Investment Co. v. Mumma.** Dismissed for failure to file briefs.

No. 44487: **Jones v. Johnson.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 44493: **Pester v. Thompson.** Dismissed for failure to file briefs.

No. 44502: **Mayo v. Mayo.** Dismissed for failure to file briefs.

No. 44510: **State v. Young.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44513: **Mohrman v. Board of Supervisors of County of Platte.** Motion of appellants for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 44514: **Mensing v. ACF, Inc.** Affirmed as amended by order of the court.

No. 44515: **State ex rel. Hilburn v. Reams.** Motion of appellee for summary dismissal sustained; appeal dismissed; see Rule 20-A(1).

No. 44519: **State ex rel. Brown v. Krueger.** Motion of appellee for summary dismissal sustained; appeal dismissed; see Rule 20-A(1).

No. 44522: **Keating v. Klemish.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 44525: **Nebraska State Council of Local Unions v. Dakota County.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 44527: **Wassom v. Bd. of County Commissioners.** Motion and stipulation for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 44534: **In re Guardianship of Lienemann.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 44535: **Huggins v. Ramada Nebraska, Inc.** Stipulation for dismissal of appeal allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 44539: **State ex rel. Peterson v. Gering Irrigation Dist.** Dismissed for failure to file briefs.

No. 44541: **Czarnick v. Czarnick.** Motion of appellants for dismissal of appeal sustained; appeal dismissed at costs of appellants.

No. 44544: **State v. Traynor.** Motion of court-appointed

counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44545: **State v. Moss.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

Nos. 44546, 44548: **Washington County Bank v. Kolterman.** By order of the court, these cases remanded for new trial pursuant to confessions entered by the appellees.

No. 81-567: **State v. Eggers.** Affirmed; see Rule 20.

No. 81-570: **State v. Woodward.** Affirmed; see Rule 20.

No. 81-573: **State v. Baker.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 81-574: **State v. Morse.** Dismissed for failure to file briefs.

No. 81-577: **Commerce Savings Lincoln, Inc. v. Rediger.** Dismissed for failure to file briefs.

No. 81-583: **State v. Robinson.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 81-586: **State v. Parker.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 81-587: **State v. Schultz.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

Nos. 81-589, 81-590: **Mittelstadt v. Rouzer.** Dismissed for failure to file briefs.

No. 81-591: **State ex rel. Douglas v. Blomberg.** Dismissed for failure to file briefs.

No. 81-592: **Beverage v. Beverage.** Affirmed as modified by order of the court.

No. 81-596: **In re Estate of Pabian.** Dismissed for failure to file briefs.

No. 81-597: **Dixon v. Reconciliation, Inc.** Motion of appellant for dismissal of appeal sustained; appeal dismissed without prejudice at costs of appellant.

No. 81-601: **Hansen v. Nebraska Engineering Company, Inc.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 81-604: **State v. Vifquain.** Affirmed; see Rule 20.

No. 81-615: **Commerce Savings Lincoln, Inc. v. Durst.** By order of the court, appeal dismissed at costs of appellant.

No. 81-621: **State v. Kling.** Motion of court-appointed

counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 81-623: **Makovicka v. Melichar.** Motion of appellant for dismissal of appeal sustained; appeal dismissed with prejudice at costs of appellant.

No. 81-626: **Lawhead v. Grantham.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 81-628: **State v. Andersen.** Affirmed; see Rule 20.

Nos. 81-629, 81-630: **State v. Sardeson.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 81-631: **State v. Gaylor.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 81-634: **Rapp v. NPPD.** Motion of appellee for summary dismissal sustained; appeal dismissed; see Rule 20-A(1).

No. 81-639: **Pegram v. Tabitha Home.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 81-655: **Basin Electric Power Cooperative v. Board of Equalization.** By order of the court, appeal dismissed.

No. 81-659: **Courtnage and Associates v. Pizza Hut of America, Inc.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 81-661: **State v. Karcher.** Affirmed; see Rule 20.

No. 81-663: **Hanway v. Hanway.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 81-668: **Snyder Industries, Inc. v. Thompson.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 81-670: **State v. Guetling.** Motion and stipulation for dismissal of appeal allowed; appeal dismissed.

No. 81-671: **State v. Wright.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 81-674: **State v. Howard.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 81-675: **State v. Regan.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 81-681: **State v. Martinez.** Affirmed; see Rule 20.

No. 81-683: **Honstein Trucking v. Sandhills Beef, Inc.** Motion of appellant for dismissal of appeal sustained; appeal dismissed with prejudice at costs of appellant.

No. 81-686: **Miller v. Miller:** Motion of appellant to dismiss appeal sustained; appeal dismissed at costs of appellant.

No. 81-688: **Nile Valley Fed. S&L v. Reisig.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 81-694: **State v. Karnish.** Affirmed; see Rule 20.

No. 81-704: **Hiatt v. Hiatt.** Affirmed as modified by order of the court.

No. 81-705: **State v. Schellhorn.** Dismissed for failure to file briefs.

No. 81-708: **Greteman v. Grewe.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 81-712: **State v. Goebel.** Dismissed for failure to file briefs.

No. 81-715: **Bartley v. Bartley.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 81-716: **Strong v. Strong Bros., Inc.** Motion of appellants for dismissal of appeal sustained; appeal dismissed at costs of appellants.

No. 81-717: **State v. Scoles.** Motion of appellant for dismissal of appeal sustained; appeal dismissed.

No. 81-722: **State v. Buchanan.** Affirmed; see Rule 20.

No. 81-725: **DeMarco v. Miller.** Motion of appellants for dismissal of appeal sustained; appeal dismissed at costs of appellants.

No. 81-726: **State ex rel. Douglas v. Faith Baptist Church.** Dismissed for failure to file briefs.

No. 81-729: **State v. McShane.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 81-739: **Emick v. Osborne.** Stipulation for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 81-743: **State v. DeShane.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 81-745: **State v. Dancer.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 81-748: **State v. Walter.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 81-750: **Strong v. Wurdinger.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 81-762: **State v. Savage.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 81-765: **Johnson v. Johnson.** Affirmed as modified by order of the court.

No. 81-777: **State v. Winters.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 81-780: **State v. Leffler.** Affirmed; see Rule 20.

No. 81-781: **State v. Leffler.** Affirmed; see Rule 20.

Nos. 81-784, 81-785: **State v. Suhr.** Affirmed; see Rule 20.

No. 81-786: **Rips v. Rips.** Settlement approved; appeal dismissed.

No. 81-791: **Johnson v. Johnson.** Affirmed as modified by order of the court.

No. 81-792: **McDonald v. Gartner.** Motion of appellant for dismissal of appeal sustained; appeal dismissed with prejudice at costs of appellant.

No. 81-795: **State v. Ellis.** Motion and stipulation for dismissal allowed; appeal dismissed.

No. 81-797: **Bruno v. Bruno.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 81-798: **Cribbs v. Cribbs.** Settlement approved; appeal dismissed.

No. 81-799: **State v. Martin.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 81-801: **Vanderwerf v. Geiger.** Motion of appellant for dismissal of appeal sustained; appeal dismissed with prejudice at costs of appellant.

No. 81-816: **State v. Puentes.** Dismissed for failure to file briefs.

No. 81-825: **Fetterolf v. Wieseler.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 81-827: **State v. Myers.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of

appellant.

No. 81-829: **Hayward v. Martin.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 20-A(2).

No. 81-836: **State v. Cohen.** Affirmed; see Rule 20.

No. 81-841: **Anesthesia Associates, P.C. v. Adley.** Stipulation for dismissal of appeal allowed; appeal dismissed; each party to pay own costs.

No. 81-842: **Miedl v. Miedl.** Affirmed as modified by order of the court.

No. 81-854: **Sullivan v. Cochran.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 81-859: **Hoblyn v. Hoblyn.** Affirmed as modified by order of the court.

No. 81-861: **Beavers v. Graham.** By order of the court appeal dismissed as frivolous at costs of appellant.

No. 81-863: **State v. Nollett.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 81-868: **State v. Markel.** Affirmed; see Rule 20.

No. 81-870: **Piehl v. Platte Valley Constr. Co.** Motion of appellants for dismissal of appeal sustained; appeal dismissed without prejudice at costs of appellants.

No. 81-871: **In re Interest of Kolb.** Motion of appellant for dismissal of appeal sustained; appeal dismissed.

No. 81-873: **Borowiak v. Kotter.** Motion and stipulation for dismissal of appeal allowed; appeal dismissed with prejudice at costs of appellant.

No. 81-876: **State v. Riffle.** Affirmed; see Rule 20.

No. 81-880: **Dozler v. Baker.** Motion of appellant for dismissal of appeal sustained; appeal dismissed with prejudice at costs of appellee.

No. 81-884: **State v. Venditte.** Dismissed for failure to file briefs.

No. 81-891: **Pearman v. Pearman.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 81-906: **Townhouser, Inc. v. City of Lincoln.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 81-912: **Haeckler v. Caribbean Yacht Charters, Inc.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 81-918: **State v. Winkler.** Motion and stipulation for dismissal of appeal allowed; appeal dismissed.

No. 82-008: **State v. Angus.** Motion of appellant for dismissal of appeal sustained; appeal dismissed.

State v. Molacek. Application for leave to docket error proceedings denied.

No. 82-015: **Taylor v. Taylor.** Affirmed as modified by order of the court at costs of appellant.

No. 82-070: **Hossman v. Hossman.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 82-097: **Kampfel v. Farmers Union Coop Ins. Co.** Stipulation for dismissal of appeal allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 82-170: **Starks v. Starks.** Motion and stipulation for dismissal of appeal allowed; appeal dismissed.

TRIBUTE

DONALD BRODKEY

CHIEF JUSTICE NORMAN KRIVOSHA.

Now, on this fourth day of January 1982, before we proceed with today's calendar, I should like to take a moment to note what I consider to be an auspicious occasion. This morning marks the beginning of the final term of this court at which Justice Donald Brodkey will sit with us as an active member of this court. He will, as you may know, reach mandatory retirement as of January 17, 1982, and will at that time go on retired status.

While we do not perceive Justice Brodkey's retirement as making a complete departure from judicial duty, we do recognize that we shall no longer be able to depend upon his dedicated service to our state and to this court, and we shall have to be content to obtain the benefits of his service on an ad hoc basis.

It is not my intent to make this a eulogy, for indeed Justice Brodkey has many years ahead of him. Rather, I would like to attempt to very briefly acknowledge what has been a long and brilliant judicial career. Few have come to this court better equipped to perform the duties of Justice of the Supreme Court.

Beginning with the active practice in 1933, followed by distinguished terms on both the Omaha Municipal Court and the Douglas County District Court, Justice Brodkey joined this court on April 5, 1974, experienced in every phase of the law.

He has, as noted by one local paper, been a dedicated and devoted servant of this law, unwilling to render judgment until he satisfied himself that he had considered all aspects of the case and the law applicable thereto.

Arthur Vanderbilt, former Chief Justice of New Jersey, in describing the essentials of a sound judicial establishment, said: "A sound judicial establishment

must have a corps of judges, each of them utterly independent and beholden only to the law and to the Constitution, thoroughly grounded in his knowledge of the law and of human nature including its political manifestations; experienced at the bar in either trial or appellate work and preferably in both; of such a temperament that he can hear both sides of a case before making up his mind; devoted to the law and justice; industrious; and, above all, honest and believed to be honest."

Chief Justice Vanderbilt would have been more than satisfied with the services of Justice Brodkey, for indeed he has more than fulfilled Chief Justice Vanderbilt's requirements for a sound judicial establishment.

To you, Justice Brodkey, we say, thank you for a job well done. You have made an indelible imprint on the law of Nebraska and your mark will remain for terms to come.

We wish you well in whatever future career you select and we extend to you our sincere thanks for your years of unselfish service to this state and to our judicial system.

IN MEMORIAM

EDWARD F. CARTER

And now, on this eleventh day of January 1982, at the hour of nine a.m., the Supreme Court of the State of Nebraska is hereby convened in special Term of Court for the purpose of receiving resolutions in memory of Edward F. Carter, a former Justice of this court who departed this life on the twenty-first day of December 1981.

CHIEF JUSTICE NORMAN KRIVOSHA.

On behalf of the court, I should like to publicly thank Judge Herbert A. Ronin for his service as chairman of the committee selected to present such resolutions. The members of the committee will be presented to the court as their resolutions are offered to the court.

HONORABLE ROBERT VAN PELT.

MAY IT PLEASE THE COURT:

Death this year has taken men
Whose kind we shall not see again.

I used these lines, and the other lines with which I will conclude, in a previous memorial service in this court at a time when only two of you were then sitting on this bench. Again today I think them appropriate.

I thank you for the invitation to participate in this service for Edward F. Carter. We were born in the same year of another century. We were truly among each other's peers. Others have been assigned to deal with various phases of his life and I shall only discuss the beginning of a longtime friendship.

I had heard favorable reports of Ed Carter before I ever met him. They came from two who became lifelong friends of each of us while they served as secretaries to members of this court. I refer to Harvey M. Johnsen, onetime secretary to Andrew M. Morrissey, Chief

Justice of this court. Judge Johnsen was later a member of this court and of the U.S. Court of Appeals for the Eighth Circuit. The other friend was Walter D. James, onetime secretary to Supreme Court Judge James R. Dean, and, later, longtime reporter for this court, a position he accepted at Judge Carter's urging. These three men, all in law school together, may have made a greater mark on this court than any three of one class or era from the Nebraska law school have ever made. Certainly the selection of Walter D. James as reporter for this court was not the least of Ed Carter's contributions to the court, and it bears mention here.

Ed and I first met as courtroom adversaries in the district courtroom at Thedford, Nebraska, in the middle 1920s. He represented Frank McCarter, and I, in effect, the Bank Guaranty Fund. We started a hearing before District Judge Clements, and at noon settled the case. Ed's comments were typical. He said he thought he could win the case. He also thought I could keep it in court two or three years; he also thought the Bank Guaranty Fund was broke and that his client should take less than he had coming in order to get the cash before that event occurred. That spirit of positiveness and certainty, and his eventual correct judgment as to the Guaranty Fund, you have seen many times in this court.

I was also to a degree a part of the famous penny controversy between Judge Carter and Chief Justice Simmons. All three of us were members of a discussion club. I was a delegate in 1940 to the upcoming Republican National Convention. Simmons wanted me to vote for Hoover. Carter thought Hoover could not be elected, and characteristically told me, though he favored Willkie, to vote for anyone except Franklin Delano Roosevelt. The paying off of the wager is immaterial at this time. I mention it because of his comment about the President. He was always unafraid to take a stand, whether on legal matters or public affairs, and to let his opinion be known when it was proper to express it. He was in many respects a Rock of Gibraltar.

The minister of the church which he attended, and which I attend, Dr. Otis E. Young, in the memorial service at the church two weeks ago today, said in his prayer of thanksgiving:

> In this time of worship and memory, we are especially thankful for your servant, Edward F. Carter. We thank you for the strength of his life, for the influence he had in home and in community, for the warmth and honesty which drew friends to him and the integrity of spirit which made them trust and admire him. We are thankful for his dedication to his work, for his family, for his creative mind and inventive spirit, for his joy in his living in this world.

I think Dr. Young has in this paragraph well characterized his life, further details of which will be referred to by other speakers. I am here, in part, to tell you that those of us who knew him as a young man saw these same qualities which will be recognized here today.

I close, completing the couplet with which I began:

> Death this year has taken men
> Whose kind we shall not see again
> Pride and skill and friendliness
> Wrath and wisdom and delight,
> Are shining still, but shining less,
> And clouded to the common sight.
> Time will show them clear again.
> Time will give us other men
> With names to write in burning gold
> When they are great and we are old,
> But these were royal-hearted, rare.
> Memory keeps with loving care
> Deeds they did and tales they told.
> But living men are hard to spare.

HONORABLE GERALD S. VITAMVAS.

MAY IT PLEASE THE COURT:

It is with humility and with a sense of sadness and

restraint that I address the court this morning. We are here to participate in this memorial service for the Honorable Edward F. Carter. Judge Carter was one of those individuals who served the State of Nebraska throughout his lifetime with dedication and competence. He was an individual who was respected for his judicial ability, his humaneness, and for his interest in other people. His grasp of the law and his ability to analyze the legal problems presented to him are well known to the members of the bar of the state that practiced before him and, I am sure, to his colleagues. His opinions were concise and well written.

While his judicial and legal abilities were well known among his associates and friends, Judge Carter was also a student of government. There is no question but that he thought the system of government devised by the early leaders of our country was the finest. He was conversant with the writings of Jefferson, Hamilton, Patrick Henry, and other leaders that participated in the formation of our present Constitution. He believed that the average citizen was not aware of the advantages of our form of government, and that this, in part, was due to a lack of knowledge of how our government worked.

It was with this thought in mind that led him, together with other prominent state leaders, to meet and to organize a project that was very dear to him. It was in 1937 when Judge Carter met with 14 other prominent Nebraskans, including Roy Cockran, Theodore Metcalf, Biff Jones, Dean F. E. Henzlik of the Teachers College, and R. C. "Pat" Patterson of the American Legion. It was from this meeting that the first session of Cornhusker Boys State was organized and held in 1938. Except for several years during World War II, these meetings have been held continuously to date. The participants are select high school students. The purposes of this organization were in part to develop an interest in and to promote an understanding of the principles of a representative democratic government, to learn of each citizen's obligation to the community,

state, and nation, and to assume responsibility for their participation in our government as citizens. Judge Carter strongly believed that a citizen needed to know how government worked in order to participate intelligently in it.

For over 33 years Judge Carter was the president of the American Legion's Cornhusker Boys State. He participated in its activities from its inception until recently when his physical condition would no longer permit it. He firmly felt that the preservation of our representative form of government requires knowledge on the part of the citizen and the courage to maintain it irrespective of any personal gain. He was well aware of the principle of the separation of powers. He felt the necessity for judicial restraint, and communicated this to the boys of each Boys State session which he opened with a discussion of the purposes of the Cornhusker Boys State organization. He made himself available to the young people attending these meetings. He would talk with them and joke with them, displaying his interest in their activities. There was no question in my mind but that he had a deep interest in the young people of the state because he knew that they were to be our future leaders and he wanted them to be equipped to participate in the governing process of which they were soon to be a part. Of course, it was impossible to reach all Nebraska students, but he could communicate to this select group.

Judge Carter was a student of government and he recognized the role of the states in our national form of government. He wrote, "The Constitution of the United States was established for the protection of the rights of the individual, and its violation, whether by misrepresentation, encroachment, or usurpation, is a direct attack upon the freedom and liberty of the citizen." He studied the procedures and events surrounding the ratification of the United States Constitution, including the debates of the Virginia Ratification Convention. Judge Carter was aware of the comments of those who opposed adoption and who desired that more

specific guarantees be written into the Constitution to prevent the usurpation of power by the federal government over the states, and to prevent the usurpation of power by the courts. However, he did believe in the authority of the judiciary to regulate its own conduct. Thus, he wrote the opinion for the court in the case integrating the Nebraska State Bar Association, relying upon the inherent powers of the judiciary to control those individuals who were to practice law before it.

I first met Judge Carter and became associated with him in 1946 when I became Deputy Clerk of the Supreme Court of Nebraska under George Turner. At that time the office of the Clerk was open on Saturday mornings but the business activities were at a minimum. Along about nine, since George usually had a coffeepot going, in would come Judge Carter, and later Judge Brower, and usually Clarence Meyer and on occasion Walt James. Various problems were discussed at this Saturday morning discussion but, of course, few were resolved. Among the Judge's other attributes was his sense of humor. His gentle and sometimes not so gentle quips and the give-and-take were certainly things he dearly loved. He liked to tell the story of one of his associates and a bet. The bet was for $5, but there was some claim that the bet was really never made. Finally his associate paid off the $5 bet, probably to avoid further comments, by bringing Judge Carter ten rolls of pennies which Judge Carter promptly put in his desk drawer. Years later, shortly before he left the bench, he dug out the pennies. He had an enterprising brother who managed to peddle them to a coin dealer for a substantial gain. Judge Carter never told his associate of the finale to that transaction.

It has been a privilege and honor to have been associated with Judge Carter in one facet of his numerous activities. His loyalty to the court and judicial system of our state and nation was evident in his writings, in his opinions, and in his activities. His patriotism in his association with the young people in the Boys State program marked him as a true American. He was a

great citizen as well as being a great Judge. He was truly a man to be admired, respected, and emulated.

RETIRED CHIEF JUSTICE PAUL W. WHITE.

MAY IT PLEASE THE COURT:

It is a privilege and an honor to express to this distinguished gathering our mutual admiration, respect, and reverence for one of the greatest Judges in our state's judicial history, Ed Carter. From time immemorial we have met to honor great Judges when they have finished the terms of their commission and have passed from our midst. We meet to eulogize their personal and judicial qualities and to remember them with fond recollection. But, in a larger sense, each Judge, and especially the great ones, carries the torch of our judicial sacraments: government under law, courage, independence, industry, devotion, patience, impartiality, and intellect, among others. As Hamilton and Madison pointed out, we in the judiciary have no purse or militia to command obedience; therefore, we must spark the white flame of respect for the law and the judiciary with the performance, personality, and character of the individual Judge.

Ed Carter was in the line of judicial march for 44 years, 36 on this court. The Constitution of 1920 restructured the judicial article and this court. In 36 years on this modern court, Ed Carter wrote some 1,100 opinions. His contributions to the settled common law of this state are unparalleled. Without doubt, his opinions are cited more than anyone else's, not only because of numbers but because of clarity and cogency.

Ed Carter was a real physician of applied liberty. With superior intellect, unsurpassable scholarly industry, dispassionate temperament, and courageous resolution of decision, he spelled out in his opinions a universally recognized clarity of concept of the law and of the nature of judicial power. He was to me, and will be to the bar and bench in the future, a continuing reminder of the proper posture of a Judge toward

both the exercise of judicial power and its self-imposed limitations.

Liberty and equality will forever be enemies. And sometimes the court must strike the balance. In performing this task for the court, Ed was unerringly vigilant in the protection of constitutional rights and the supremacy of the law against arbitrary and unreasonable executive or legislative action. And with it all, he had a pervasive sense of the wisdom of the common law and the necessity to achieve a certainty and clarity by which the people could guide their lives under our great constitutional concept of ordered liberty.

We have to go back to Lord Coke, Chief Justice of England, and the commendams case, to witness judicial courage of the type Ed Carter had. It was June 1616. King James had issued a commendams benefice to a bishop. The existing owners sued the bishop for deprivation. The issue was whether, under the law, the King had any right at all to deprive the owners and issue the commendams. The King ordered the case halted and summoned Coke, as Chief Justice of England, and all the Judges before the Privy Council.

Here is the official transcript of those proceedings: "Thereupon his Majesty and the Lords thought good to ask the Judges severally their opinion; the question being put in this manner: Whether at any time, in a case depending before the Judges, which his Majesty conceived to concern him either in power or profit, and thereupon required to consult with them, and that they should stay proceedings in the meantime, they ought not to stay accordingly? . . . They all (the Lord Chief Justice only except) yielded that they would, and acknowledged it to be their duty to do so; only the Lord Chief Justice of the King's bench said for answer, *That when the case should be, he would do that which should be fit for a Judge to do.*"

Ed Carter's hallmark was the same as Coke's: "That when the case should be, he would do that which should be fit for a Judge to do."

Now, a little about Ed Carter and change. He knew

about changes. And he had the courage to accomplish them. I mention just three, a very inadequate presentation of his long career of judicial leadership.

1. The integration and creation of the organized bar under Supreme Court control. He had led the fight for acceptance by the bar; he wrote the opinion in 1937; and, without doubt, almost singlehandedly established our present system.

2. As chairman of the Judiciary Council from the time of its creation, he was instrumental in initiating and drafting hundreds of administrative and procedural changes in the administration of justice.

3. The drafting and enactment of the Juvenile Court Act, in about 1958 and 1959, substantially in effect today, which adequately protects the constitutional rights of parents and children.

Ed Carter was always for change, when needed; for deliberated change, within constitutional limits. He was opposed to all usurpation of power, be it executive, legislative, or judicial.

I think the career of Carter did justice to a sage's advice: "We must welcome the future, remembering that soon it will be the past, and we must respect the past, remembering that once it was all that was humanly possible."

Ed Carter fulfilled the highest ideals of the dedicated servant for over 30 years on the bench. His devotion to the bench and to this court can only be characterized as religious in nature. But it did not narrow him in a personal sense. To us who knew him, he was kind, generous, tolerant, friendly, and humorous. We miss him deeply in a personal as well as a judicial sense. He was a great workman. His life was literally the law. In the words of another great Judge to the profession and the bench, Ed Carter will forever remain as an example of the accomplished Judge: sagacity, insight and acuteness, courtesy, dignity and humor, wisdom, learning and uprightness, as the commission of a Judge must read. All of these he has given to his generation; and as a final tribute, we take increased devotion and

inspiration so that we may carry on and continue the ideals and traditions that he so aptly and clearly represented. We hope that we who go forward have the wisdom to recognize what he has given us, and that we, in some small sense, may march forward to the goal of true justice and liberty.

ASSOCIATE JUSTICE LESLIE BOSLAUGH.

When Ed Carter was taking the oath of office as a member of this court, I was a senior in high school in Hastings, Nebraska. In 1934, when Judge Carter was elected to the Supreme Court, he had already served more than seven years as a district judge in the Scottsbluff district. Yet, when he took office as a Judge of this court, he was the youngest member of the court in the history of the state. At his retirement he had the longest term of any Judge of this court in the history of the state.

He became the senior Judge in 1949 and served in that capacity during the next 22 years.

It was my good fortune to serve with Judge Carter from 1961 until his retirement in 1971. I consider it a great honor to be asked to participate in these proceedings this morning.

Judge Carter was indeed a remarkable man. He had all of the qualities that one would hope for in a Judge of the Supreme Court. He was a careful and tireless worker. He always did more than his share of the work. He delighted in having the most difficult cases assigned to him.

Judge Carter's opinions were among the most "readable" of any that have been published. They had a quality of clarity that should be the standard for all Judges. Many, if not all, of the original drafts of his opinions were written in longhand. They revealed the care and thought that he put into each sentence that he authored.

If I were to choose three qualities which I believe were best exemplified in Judge Carter, I would select courage, integrity, and a sense of duty. Judge Carter respected the authority and responsibility that was

vested in him as an appellate judge and he did not hesitate to do what he felt was right and just. Yet, I want to call attention to his great sense of humor and his kindness to others. Although at times Ed Carter may have appeared to be stern, perhaps even gruff, there was a very kind man underneath that appearance and a great sense of humor that was hidden but for the moment.

Judge Carter was especially kind to the younger Judges. He was always available to discuss any problem that was troubling another colleague, and he was a very easy man to talk to, whether you were in agreement or disagreement with his point of view. He had a speech entitled "How to Avoid Reversible Error" that he delivered to the district judges on occasion. I always considered that a rather formidable task.

As the senior Judge of this court for 22 years, he was alert for those situations that arise from time to time and require special attention. When an emergency would arise that required him to assume the role of leadership, he did not hesitate to do what was necessary to assure that the court would continue to function as it should. He was a good man to have around when "the going got tough."

On another occasion such as this, Judge Carter said of one of his colleagues, "As a Judge he was fair and impartial, completely independent, learned and practical in his application of the law, and worthy of the admiration that his contemporaries on the bench had for him." These remarks are most appropriate as a description of Judge Carter himself.

To know Judge Carter was to admire and respect him. His unquestioned integrity, his unimpeachable character, his loyalty to his friends, his dedication to this court, and his devotion to his family marked him as a man entitled to the admiration of all who knew him. We all shall miss him very much.

CHIEF JUSTICE NORMAN KRIVOSHA.

I would, at this time, add a few additional words on behalf of myself and the other members of the court.

I learned of the demise of Justice Carter by means of a death notice which appeared in a local paper immediately following his passing. When many a man dies, a similar death notice appears in the press. In reality, however, for many the notice is in fact a life notice, because, but for the notice, the world would never have known that the man had ever lived. For many, the announcement of one's death is the first and only notice to the world that one has lived.

Not so for Justice Edward F. Carter. Of Justice Carter it may indeed be said, "He lived this life." His very existence has left its mark upon the law generally and upon a host of citizens of this state specifically. Few other men have singlehandedly had so profound and so lasting an effect upon the law of this state.

Those who have preceded me this morning have described just who it was that was known as Justice Edward F. Carter. I shall not attempt to repeat what has already been said. I would, however, observe, as one who practiced before him when he served on this very court, "He was the epitome of a Supreme Court Justice." Not only will he be known and remembered by those whose good fortune it was to know him in person during his lifetime, but he will be known as well by generations not yet born, who will read his decisions and thereby know him and the impact he had upon an entire society.

His very existence was the essence of life. He knew just who he was and what his role in this life should be. At an age when most are just beginning to reflect on how they shall spend the rest of their lives, Justice Carter already knew. He chose to dedicate himself to public service, forgoing many of the worldly benefits one so versed in the law might have otherwise attained. Instead, he chose to gain his wealth by reputation and the esteem of his fellow man.

An anonymous psalmist once wrote:

"There are three Crowns, the Crown of the holy word, the Crown of priesthood and the Crown of royalty.

"But the crown of a good name excels them all.

"He who has acquired a good name, has enriched himself.

"Even a long life ends soon, But a good name endures forever.

"Happy is the man who has acquired a good name, And retains it when he departs this world.

"A good name is rather to be chosen than great riches, And honor rather than silver and gold."

Justice Edward F. Carter did indeed acquire a good name and lived a full life. His memory shall abide with us forever and his life shall serve as an example for us all.

The resolutions offered this morning are received by the court and adopted. It shall be the order of this court that all of the resolutions offered this morning be extended at length on the journal of this court and printed in the official reports of this court so that all may see them. To the family of Justice Edward F. Carter we extend our expressions of sympathy and our resolutions of respect, and further direct that copies of these proceedings shall be made available to the family.

We are adjourned.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1981

IN RE INTEREST OF JAMES STOPPKOTTE, JR., ET AL., MINOR CHILDREN. STATE OF NEBRASKA ET AL., APPELLEES, V. DONNA STOPPKOTTE ET AL., APPELLANTS.

312 N.W.2d 454

Filed November 13, 1981. No. 44042.

1. **Parental Rights: Appeal and Error.** An appeal from an order terminating parental rights requires a de novo review upon the record.
2. **Parental Rights.** An order of the juvenile court terminating parental rights under Neb. Rev. Stat. § 43-209 (Reissue 1978) must be based on clear and convincing evidence.
3. ——. The rights of parents to maintain custody of their children is a natural right subject only to the paramount interest which the public has in the protection of the rights of a child.
4. ——. Courts may not properly deprive a parent of the custody of a minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship or has forfeited that right.
5. ——. Courts cannot deprive a parent of the custody of a child merely because a parent has limited resources or financial problems or is not socially acceptable, nor because the parent's lifestyle is different or unusual. Neither can a court deprive a parent of the custody of a child merely because the court reasonably believes that some other person could better provide for the child.
6. **Child Custody.** The best interests of the child, not that of the parents, is the primary concern in deciding custody cases.
7. **Parental Rights.** When natural parents cannot rehabilitate themselves within a reasonable time after the adjudication hearing, the best interests of the child or children require that a final disposition be made without delay.

Appeal from the District Court for Hall County: JOSEPH D. MARTIN, Judge. Affirmed.

Lloyd W. Kelly of Kelly & Kelly for appellants.

James D. Livingston of Cunningham, Blackburn, VonSeggern, Livingston, Francis & Riley and Stephen Von Riesen, Hall County Attorney, for appellees.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

WHITE, J.

Appellants, James and Donna Stoppkotte, appeal from an order of the District Court for Hall County, Nebraska, affirming an order of the Hall County Court terminating appellants' parental rights in their five children, James, Jr., Trinda, Mindy, Maria, and Joseph.

The first juvenile petition, filed March 26, 1979, alleged that Mindy, Maria, and Joseph, ages 6, 3, and 5 months, respectively, were children within the meaning of Neb. Rev. Stat. § 43-202(2) (Reissue 1978) in that their mother left home and her whereabouts was unknown, and that they lacked proper parental care by reason of the fault and habits of their parents. The second petition, filed April 25, 1979, alleged that James, Jr., and Trinda, ages 10 and 8, respectively, were children within the meaning of Neb. Rev. Stat. § 43-202(2) (Reissue 1978) in that they lacked proper parental care because their parents were both alcoholics and neglected the care of the children when drinking. It further alleged that the parents failed to provide proper medical, dental, and visual care for the children.

On April 25, 1979, a hearing was held to determine temporary custody of the children. The parents were present with their attorneys, as were the guardian ad litem and the county attorney. Evidence at this hearing showed that Mrs. Stoppkotte disappeared March 17, 1979, and her whereabouts was unknown until March 23, 1979. Grand Island Police Officer Gary Wayne Schwieger and Hall County Department of Public Welfare worker Margaret McClaren testified that they removed the children from their grandmother's

home on March 22, 1979, after receiving reports that the children's mother had abandoned them and that the grandmother could not take care of them. Upon arrival at the Stoppkotte home, they learned that James and Donna Stoppkotte and their five children were living in the living room of the grandmother's two-bedroom home. Also living in the home was Mr. Stoppkotte's older brother. McClaren testified that the children were dirty and lacked personal hygiene. The home was a mess and unkept. In McClaren's opinion, she felt the grandmother was unable to care for the children because she was 79 years old and crippled. There were no clean clothes and only one baby bottle. Joseph, the youngest at 5 months, had a severe head cold. McClaren and Schwieger removed the children and took them to Children's Village in Grand Island, Nebraska. When they returned, Mr. Stoppkotte was home. They explained to him what they had done and asked that he get some clothing for the children. Mr. Stoppkotte told them he had not seen his wife since March 17, 1979. McClaren testified that the following Monday, March 26, 1979, Mrs. Stoppkotte called her and said she was back.

Testimony showed that the children were in need of medical care at the time they were removed from the home. Four of the children had worms. Temporary custody was placed in the Hall County Department of Public Welfare pending further disposition.

On August 24, 1979, an adjudication hearing was held. At this hearing the parents admitted the allegations contained in the petitions. Both parents admitted being alcoholics. At the hearing, evidence was taken.

Exhibit 1 was a police report involving Mrs. Stoppkotte's absence. Mrs. Stoppkotte said in the report that she was on her way to get some beer about 11:30 the morning of March 17, 1979, when she stopped at a friend's home to make a telephone call. She stayed there for a while and had a few beers, then left with a man to go pick up the beer. According to Mrs. Stoppkotte, the

man drove to his home after picking up the beer, dragged her inside, and raped her several times. She reported the man locked her in his home for the entire week and forced her to have intercourse between 35 and 40 times during the week. An investigation into the incident discredited Mrs. Stoppkotte's story.

Other exhibits involve psychological evaluations of Donna, James, and the five children. The entire family was seen at the Mid-Nebraska Community Mental Health Center in Grand Island, Nebraska. Mrs. Stoppkotte was diagnosed as having alcohol addiction. She was recommended to receive treatment at the center and was urged to attend Alcoholics Anonymous (AA) meetings. Mr. Stoppkotte was diagnosed as being an excessive habitual drinker. He was urged to receive alcohol treatment.

James, Jr., the oldest child, had been seen by the center before in regard to suicidal tendencies. Reports indicated he had a low self-concept and lacked adequate social skills to get along with his peers. He received individual therapy at the center.

Another exhibit indicated that the school nurse had urged Mr. and Mrs. Stoppkotte to seek dental and visual care for their oldest son, James, Jr., for the last 4 years. The remaining exhibits were dental reports showing extensive work needed by the children at the time they were removed.

On May 8, 1979, Mrs. Stoppkotte voluntarily admitted herself into the Hastings Regional Center, Hastings, Nebraska, for treatment of alcoholism. She checked out of the program after only 3 days. Reports indicated that she had a poor view of her drinking problem.

The children were adjudicated minors in need of special supervision and temporary custody was to continue in the Hall County Department of Public Welfare. Arrangements were made for the rehabilitation of Mr. and Mrs. Stoppkotte. In July 1979 an agreement was entered into between the parents and the Hall County Department of Public Welfare. The conditions

of the agreement were as follows: (1) Bring all outstanding bills and wage statements to the Hall County Department of Public Welfare office so the budget could be worked out; (2) File for bankruptcy if necessary; (3) Attend AA meetings at least once per week and obtain written verification of attendance; (4) Continue to work with William W. Little of the Mid-Nebraska Community Mental Health Center; (5) Donna Stoppkotte should find employment and should cooperate with vocational rehabilitation; (6) Find more adequate housing prior to return of the children; and (7) Visit the children on a regular basis.

On January 3, 1980, a dispositional hearing was held. A motion to terminate parental rights which had been filed the previous day was withdrawn and testimony was heard on the rehabilitation progress of Mr. and Mrs. Stoppkotte since the adjudication hearing.

Reports from the Mid-Nebraska Community Mental Health Center, McClaren, and Rebecca Salmon of the Hall County Department of Public Welfare indicated progress of the children showed that they were adapting well to foster care. The opinions of social workers and mental health specialists indicated the children would be better off removed from their parents and remaining in foster care.

McClaren testified that she had tried to work with Mr. and Mrs. Stoppkotte to rehabilitate themselves. She indicated that they had complied with very few of the conditions they agreed upon. The entire testimony at this hearing showed that the parents had failed to comply with any of the conditions and to rehabilitate themselves. The court warned the parents of the consequences of their acts and gave them until March 28, 1980, to comply with the conditions. The only condition complied with was visitation of the children. On several occasions, Mr. Stoppkotte did not show up and Mrs. Stoppkotte had been drinking.

A motion to terminate parental rights was filed March 14, 1980. A hearing on the motion was held

March 28, 1980. Testimony showed a lack of compliance with the conditions of the agreement. On February 19, 1980, Mrs. Stoppkotte was voluntarily admitted to Valley Hope Association in O'Neill, Nebraska. She removed herself from the program March 1, 1980, and never returned. Testimony indicated that both parents were still alcoholics and were not doing anything to cure the situation. Because of the lack of rehabilitation after 1 year, the trial court entered an order terminating parental rights on June 6, 1980. Appeal was taken to the District Court for Hall County and the decision of the county court was affirmed on January 5, 1981. After a motion for new trial was overruled, both parents appealed to this court.

An appeal from an order terminating parental rights requires a de novo review. *In re Interest of Bird Head*, 209 Neb. 575, 308 N.W.2d 837 (1981). An order of the juvenile court terminating parental rights under Neb. Rev. Stat. § 43-209 (Reissue 1978) must be based on clear and convincing evidence. *In re Interest of Kimsey*, 208 Neb. 193, 302 N.W.2d 707 (1981); *In re Interest of Hiatt*, 209 Neb. 195, 307 N.W.2d 108 (1981).

The right of parents to maintain custody of their child is a natural right subject only to the paramount interests which the public has in the protection of the rights of a child. *In re Interest of Kimsey, supra.*

The rule has long been established in this state that courts may not properly deprive a parent of the custody of a minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship or has forfeited that right. *In re Interest of D.*, 209 Neb. 529, 308 N.W.2d 729 (1981). Courts cannot deprive a parent of the custody of a child merely because a parent has limited resources or financial problems or is not socially acceptable, nor because the parent's lifestyle is different or unusual. Neither can a court deprive the parent of the custody of a child merely because the court reasonably believes that some other person could better provide for the child. *In re Interest*

of D., supra. This is not the situation here. A review of the record indicates that the parents are unfit to perform their duties since they are alcoholics and have not properly provided for their children's needs. We have said before that the best interests of the child, not that of the parents, is the primary concern in deciding custody cases. *In re Interest of Wood and Linden,* 209 Neb. 18, 306 N.W.2d 151 (1981). The parents in this case were given every opportunity to rehabilitate themselves. After 1 year they were still not able to correct their problems. Any effort to rehabilitate themselves was minimal. We said in *In re Interest of McKee,* 208 Neb. 623, 304 N.W.2d 918 (1981), that when natural parents cannot rehabilitate themselves within a reasonable time after the adjudication hearing, the best interests of the child or children require that a final disposition be made without delay. In the case at bar, the evidence is clear and convincing that the parents have continuously and repeatedly neglected their children and failed to discharge their duties of parental care and protection.

AFFIRMED.

KRIVOSHA, C.J., dissenting.

I must respectfully dissent. I do not believe that the evidence in this case clearly and convincingly establishes that the parental rights of the parents must be terminated. Admittedly, the evidence discloses that the parents are chronic alcoholics and have not been very successful in attempting to rehabilitate themselves. I do not believe that a year is a sufficient period of time in which to determine that the condition of the parents is such that it cannot be corrected. To be sure, there are never any perfect solutions in cases of this nature. The courts are always confronted with deciding whether it is better to terminate after a brief time and find permanent homes for children, or to wait awhile in hopes that the natural parents may rehabilitate themselves and once again have custody of their children. If the

mother in this case was afflicted with a physical ailment which caused these problems, we are not likely to terminate parental rights so quickly as we are because of the emotional problems related to drinking.

The majority notes that the court warned the parents of the consequences of their acts and gave them nearly 90 days to comply with certain conditions, none of which were met except visitation with the children. One who is familiar with the problems of alcoholics might recognize that imposing a 90-day time frame on an alcoholic might only tend to drive him further to drink. The majority notes that because of the lack of rehabilitation after 1 year, the trial court entered an order terminating the parental rights. I believe that under the circumstances 1 year was inadequate. I would continue foster care for some additional time in hopes that the rights of the parents could be permanently restored. It appears to me that there will be adequate time to terminate parental rights if no other alternative exists.

VICKIE L. HENDRICKSON, FORMERLY VICKIE L. PUGLIESE, APPELLANT AND CROSS-APPELLEE, V. CITY OF KEARNEY, NEBRASKA, APPELLEE AND CROSS-APPELLANT.

312 N.W.2d 677

Filed November 20, 1981. No. 43491.

Political Subdivisions: Highways. It is the duty of a political subdivision to use reasonable and ordinary care in the construction, maintenance, and repair of its highways and bridges so that they will be reasonably safe for the traveler using them while he is in the exercise of reasonable and ordinary care and prudence.

Appeal from the District Court for Buffalo County: DEWAYNE WOLF, Judge. Affirmed.

John T. Tarrell of Tarrell & Alexander and Donald J. Loftus, P.C., for appellant.

Marmion F. Yeagley and Kenneth F. George of State & Yeagley and Michael E. Kelley for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

MCCOWN, J.

This is an action for damages against the City of Kearney, Nebraska, under the Political Subdivisions Tort Claims Act arising out of an automobile accident on a railway overpass. At the conclusion of the plaintiff's evidence the District Court sustained defendant's motion to dismiss and the plaintiff has appealed.

At about 10:30 a.m. on January 17, 1977, the 24-year-old plaintiff was driving a Jeep pickup over an elevated railroad overpass which is on 2nd Avenue and Highways 10 and 44 in the City of Kearney. Plaintiff's vehicle slid on the surface of the overpass, spun out of control, crossed the concrete median, and struck another motor vehicle going in the opposite direction. The plaintiff sustained very severe personal injuries.

The weather at the time was misty and the condition of the surface of the overpass was the same as on the other streets of Kearney. Most witnesses testified that the surface of the overpass was wet, but not icy. Two described it as icy. None of the witnesses had any trouble controlling their vehicles and none of them slipped or slid. All witnesses who drove over the overpass that morning did so without incident.

The testimony was uncontradicted that the City monitors all the streets by visual inspection and by driving over them, and that during periods of bad weather there was more frequent monitoring and special attention was given to high traffic areas, including the overpass. There was also testimony that there had been no accidents on the overpass other than the one involving the plaintiff over a period of many years.

There were signs on the approaches at both ends of the overpass which stated: "Bridges may be icy."

The signs have been in place for at least 14 years. The City of Kearney has maintained the roadway surface of the overpass for many years under a contract with the State Department of Roads. The contract specifically provides: "Maintenance that may be required by 'Acts of God' — are not covered by this agreement but shall be performed under special agreement in each specific case."

Neb. Rev. Stat. § 39-1339 (Reissue 1978), incorporated in the contract by reference, provides that in contracts such as this maintenance shall be limited to such things as are caused either by wear and tear of travel or by acts of God, but shall not be construed to include snow removal or repairs or reconstruction going beyond the scope of normal surface maintenance or normal wear and tear of travel.

The public works director for the City of Kearney testified that for all the years in which he had been associated with the City of Kearney, maintenance of the overpass by the City had included treating the overpass for icy or slick conditions, and that the City had been applying sand to treat icy or slick conditions on the overpass for many years. The evidence also established that the City of Kearney had loaded two trucks with sand the night before the accident and that sand was applied to the surface of the overpass after the accident involved in this case occurred.

At the conclusion of plaintiff's evidence the District Court sustained defendant's motion to dismiss for the reason that "neither the common law nor the statutes impose any duty upon the City to either remove snow on public streets or to treat its streets for icy conditions and that in the absence of such duty, any failure of performance does not constitute negligence." The court dismissed plaintiff's petition and plaintiff has appealed.

Under the Political Subdivisions Tort Claims Act if any person suffers personal injury, loss of life, or damage to property by means of insufficiency or

want of repair of a highway or bridge or other public thoroughfare which a political subdivision is liable to keep in repair, he may recover in an action against the political subdivision. See Neb. Rev. Stat. § 23-2410 (Reissue 1977).

Neb. Rev. Stat. § 23-2411 (Reissue 1977) provides that in enacting § 23-2410 it was the intent of the Legislature that the liability of all political subdivisions based on the insufficiency or want of repair of a highway or bridge or other public thoroughfare shall be the same liability that had been imposed upon counties pursuant to § 23-2410 (previously Neb. Rev. Stat. § 39-834 (Reissue 1968)).

The Legislature also declared in § 23-2411 that judicial interpretations governing the liability of counties on January 1, 1970, shall be controlling on the liability of all political subdivisions for the alleged insufficiency or want of repair of any highway or bridge or other public thoroughfare. The section also provides that §§ 23-2410 and 23-2411 shall be the only sections governing determination of liability of political subdivisions for the alleged insufficiency or want of repair of highways or bridges or other public thoroughfares, and provides that public thoroughfares shall include all streets, alleys, and roads designed, intended, and primarily used for the movement of vehicular traffic and dedicated to public use.

Provisions similar to those of § 23-2411 are also incorporated into the State Tort Claims Act. See Neb. Rev. Stat. § 81-8,219(2) (Reissue 1976). The critical language referring to damage "by means of insufficiency or want of repair of a highway or bridge" is identical in the Tort Claims Act to the language in the former § 39-834.

This court repeatedly held prior to 1970 that under that language a county was obligated to use reasonable and ordinary care in the construction, maintenance, and repair of its highways and bridges so that they will be reasonably safe for the traveler using them

while he is in the exercise of reasonable and ordinary caution and prudence. *Olson v. County of Wayne*, 157 Neb. 213, 59 N.W.2d 400 (1953); *McKinney v. County of Cass*, 180 Neb. 685, 144 N.W.2d 416 (1966). The same duty has now been imposed under the State Tort Claims Act and under the Political Subdivisions Tort Claims Act. See, *Richardson & Gillispie v. State*, 200 Neb. 225, 263 N.W.2d 442 (1978); *Christensen v. City of Tekamah*, 201 Neb. 344, 268 N.W.2d 93 (1978); *Hansmann v. County of Gosper*, 207 Neb. 659, 300 N.W.2d 807 (1981).

In the case now before us the action was dismissed at the conclusion of the plaintiff's case. The only reason for dismissal stated by the court was that neither the common law nor the statutes impose any duty upon a first-class city to remove snow on public streets or to treat its streets for icy conditions. The stated reason for dismissal holds that there is never any duty upon a first-class city to remove snow on public streets or to treat its streets for icy conditions under any conceivable set of factual circumstances or conditions, and that consequently no failure of performance can constitute negligence. That rule is too broad. We cannot say that there are never any factual circumstances which may impose a duty upon a first-class city to remove snow or to treat its streets for icy conditions, at least where the evidence is undisputed that the city has assumed such responsibilities in the past. Nevertheless, in the present case there is insufficient evidence of negligence on the part of the City, even if it be assumed that the City had a general duty to use reasonable and ordinary care in treating its streets for icy conditions.

Under the tort claims acts the District Court, sitting without a jury, has exclusive jurisdiction to hear, determine, and render judgment on any tort claim covered by the acts and is the fact finder as well.

Under such circumstances, the fact that the trial court stated only an incorrect reason for reaching

the correct result is not reversible error. This court has consistently held that where a correct judgment or order has been made, the mere fact that it contains erroneous declarations of law does not require reversal. See *Lux v. Mental Health Board of Polk County*, 202 Neb. 106, 274 N.W.2d 141 (1979).

The trial court correctly dismissed the plaintiff's petition and the judgment of the District Court is affirmed.

AFFIRMED.

CLINTON, J., concurring in the result only.

I concur in the result only and disagree insofar as the majority opinion implies a subdivision of government may be liable for conditions resulting solely from the weather. The liability of a subdivision for injuries or damages caused by the condition of roads and bridges is measured by the terms of the statute, Neb. Rev. Stat. § 23-2411 (Reissue 1977) and § 81-8,219(2) (Reissue 1976), and it has no liability beyond that. The terms "insufficiency" or "want of repair" do not embrace conditions resulting naturally from weather and climate such as rain, snow, and ice unaffected by any act of the subdivision. I can find no precedent which supports the position that subdivisions may be liable because a road or street is icy or dangerous solely as a consequence of natural conditions. Slippery conditions may cover large areas or may be isolated and spotty. To make the subdivision liable in these circumstances is to make it an insurer. Dicta of this court indicate that the subdivision is not liable for "climatic conditions" beyond its control. *Stevens v. County of Dawson*, 172 Neb. 585, 111 N.W.2d 220 (1961).

PAUL RHODES, APPELLANT, V. ODAVILLE YATES, APPELLEE.

312 N.W.2d 680

Filed November 20, 1981. No. 43563.

1. **Courts: Judicial Notice.** The general rule is that while the court will take judicial notice of its own records, it will not in one case take judicial notice of the record in another case.
2. ____:____. Where cases are interwoven and interdependent and the controversy involved has already been considered and determined by the court in the former proceedings involving one of the parties now before it, the court has a right to examine its own records and take judicial notice of its own proceedings and judgments in the former action. Matters so judicially noticed are properly considered when determining questions presented by a demurrer.

Appeal from the District Court for Morrill County: ROBERT O. HIPPE, Judge. Affirmed.

Paul Rhodes, pro se.

Robert J. Bulger of Bulger & Jensen for appellee.

Heard before BOSLAUGH, CLINTON, BRODKEY, and WHITE, JJ., and HOWARD, District Judge.

WHITE, J.

This is a companion case to the case of *Nat. Bank of Commerce Trust & Savings Assn. v. Rhodes*, 207 Neb. 44, 295 N.W.2d 711 (1980). In that case, certain deeds to Rhodes were found to be fabrications. This court, agreeing with the trial court, found that signatures and an acknowledgment had been executed as part of a power of attorney and had later been detached and reattached to an instrument purporting to convey real estate to a grantor of Paul Rhodes. The court further found that the instrument had never been delivered, based on the testimony of the purported grantee, Augustine Rhodes, that she had never seen or had possession of the deed.

This is a suit by appellant, Paul Rhodes, defendant in the previous case, against Odaville Yates, the notary

public on the power of attorney of March 10, 1956, for slander of title. The trial court sustained a demurrer to the amended petition and dismissed the action. Rhodes appeals. We affirm.

The amended petition alleges that on August 18, 1978, the appellee Yates executed an affidavit, the effect of which was to reinforce the appellant's contention that it was a deed acknowledged by him on March 10, 1956. The amended petition also alleges that Yates gave a sworn statement to an attorney for the National Bank of Commerce on October 13, 1978, which contradicted in many material respects the affidavit of the previous August. Both the affidavit and the statement were received in evidence at the trial in the first action and were incorporated in the amended petition in this action. The petition alleges further that the sworn statement of October 13, 1978, was false and was responsible for the "defeat [of] this plaintiff's title . . . by defeating the Affidavit of the defendant herein in the Affidavit of August 18, 1978."

The general rule is that while the court will take judicial notice of its own records, it will not in one case take judicial notice of the record in another case. However, where cases are interwoven and interdependent and the controversy involved has already been considered and determined by the court in the former proceedings involving one of the parties now before it, the court has a right to examine its own records and take judicial notice of its own proceedings and judgments in the former action. Matters so judicially noticed are properly considered when determining the questions presented by a demurrer. *Knapp v. City of Omaha*, 175 Neb. 576, 122 N.W.2d 513 (1963).

The cause before us is essentially the same as that previously before this court. The appellant, by his reference to *Nat. Bank of Commerce Trust & Savings Assn. v. Rhodes*, *supra*, in his petition and amended petition, allowed the findings of fact in that case to be

considered in sustaining the demurrer.

The deeds upon which the appellant bases his claim were found to be fabricated and to never have been delivered. Since the issue here has been tried and judicially determined, the appellant cannot be heard to now question collaterally the expressed findings of that cause. In addition, appellant could recover no damage for being deprived of the title to property that he never acquired.

For the foregoing reasons, the judgment of the trial court was correct and is affirmed.

AFFIRMED.

IRVIN B. MCKAIN, APPELLEE, V.
MARY PATRICIA MCKAIN, APPELLANT.

312 N.W.2d 681

Filed November 25, 1981. No. 43647.

Appeal from the District Court for Sarpy County: GEORGE H. STANLEY, Judge. Affirmed.

Del Pelton for appellant.

Watts & Moran for appellee.

Heard before KRIVOSHA, C.J., MCCOWN, and HASTINGS, JJ., and KORTUM and GRANT, District Judges.

PER CURIAM.

The instant appeal involves a domestic relations matter.

The court, having reviewed the record in this case de novo, agrees with the result reached by the trial court. The judgment is affirmed.

AFFIRMED.

LESTER JOHN FISHER, APPELLANT, V.
OPAL MAY FISHER, APPELLEE.

312 N.W.2d 682

Filed November 25, 1981. No. 43648.

Appeal from the District Court for Johnson County: WILLIAM F. COLWELL, Judge. Affirmed.

John E. Trecek for appellant.

Thomas L. Morrissey for appellee.

Heard before KRIVOSHA, C.J., MCCOWN, and HASTINGS, JJ., and KORTUM and GRANT, District Judges.

PER CURIAM.

The instant appeal involves a domestic relations matter.

The court, having reviewed the record in this case de novo, agrees with the result reached by the trial court. Appellee is awarded the sum of $300 for her attorney. The judgment is affirmed.

AFFIRMED.

LEE SHAW, APPELLANT, V.
GOOCH FEED MILL CORPORATION,
A CORPORATION, APPELLEE.

312 N.W.2d 682

Filed November 25, 1981. No. 43811.

1. **Workmen's Compensation: Appeal and Error.** In reviewing workmen's compensation cases, this court is bound by the provisions of Neb. Rev. Stat. § 48-185 (Reissue 1978). Findings of fact made by the Nebraska Workmen's Compensation Court after rehearing shall have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong.
2. **Workmen's Compensation: Evidence.** In determining the sufficiency of evidence necessary to sustain an award of the Nebraska Workmen's Com-

pensation Court after rehearing, such evidence must be considered most favorably to the successful party, every controverted fact must be resolved in his or her favor, and he or she must receive the benefit of every inference reasonably deducible from it.

3. **Workmen's Compensation.** It is not the precise type of work that determines whether or not a workman is totally and permanently disabled, but, rather, total and permanent disability contemplates inability of the workman to perform any work in which he has experience or the capacity to perform.

Appeal from the Nebraska Workmen's Compensation Court. Affirmed.

Kenneth Cobb for appellant.

Baylor, Evnen, Curtiss, Grimit & Witt for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

WHITE, J.

This is a workmen's compensation action. Appellant, Lee Shaw, was injured on June 22, 1978, in the course of his employment with the appellee, Gooch Feed Mill Corporation, when a grinder hood, weighing approximately 600 pounds, fell and struck Shaw in the right chest and shoulder area. The appellant suffered multiple injuries, including multiple rib fractures on the right side, a fractured left clavicle, a punctured right lung, and an 8-inch laceration of the right axilla and armpit. The appellee admitted that the appellant's injuries arose out of and in the course of his employment at the appellee's place of business. The issue actually tried in the Workmen's Compensation Court and on rehearing was the extent of the disability due to the accident and injuries.

Appellant argues here, as he did in the Workmen's Compensation Court, that he is permanently and totally disabled. The three-judge compensation court on rehearing found that the appellant was entitled to benefits of $154.67 per week for 39 weeks for temporary total disability, and thereafter and in addition thereto the

sum of $23.20 per week for 261 weeks for 15 percent permanent partial disability. Essentially, the appellant challenges the findings of fact by the Workmen's Compensation Court and a further finding by the court that appellant "has failed to prove that he is totally disabled and that he is disabled from performing work for which he has had training or for which he is fitted."

In reviewing workmen's compensation cases, this court is bound by the provisions of Neb. Rev. Stat. § 48-185 (Reissue 1978). Findings of fact made by the Nebraska Workmen's Compensation Court after rehearing shall have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong. *Osteen v. A.C. and S., Inc.*, 209 Neb. 282, 307 N.W.2d 514 (1981); *Newbanks v. Foursome Package & Bar, Inc.*, 201 Neb. 818, 272 N.W.2d 372 (1978). In determining the sufficiency of evidence necessary to sustain an award of the Nebraska Workmen's Compensation Court after rehearing, such evidence must be considered most favorably to the successful party, every controverted fact must be resolved in his or her favor, and he or she must receive the benefit of every inference reasonably deducible from it. *Osteen, supra; McCann v. Holy Sepulchre Cemetery Assn.*, 205 Neb. 444, 288 N.W.2d 45 (1980).

There is sufficient evidence in the record to support the Workmen's Compensation Court finding that the appellant suffered a 15 percent permanent partial disability to his body as a whole and that the appellant achieved his maximum recovery on March 22, 1979, some 39 weeks after the injury. There was further evidence by two medical witnesses that there was nothing that would physically prevent appellant from trying to perform a sweeper job or boilerman's job at the Gooch plant as the duties of those jobs were outlined by the evidence. The sweeper job was offered to the appellant, and the appellant conceded that he knew of the availability of the boilerman's job. Appellant testified that he had not sought employment from any other em-

ployer. One of the reasons he gave for not seeking employment was that he did not know whether he wanted to return to work.

We do not discount the extended evidence of the appellant or of medical witnesses which suggested that the appellant had considerable residual pain and a severe limitation in the lifting power of his right arm, or the evidence that the appellant would be totally disabled from any job which required heavy lifting. We merely point out that our scope of review is whether the facts support the findings of the Workmen's Compensation Court. It is not the precise type of work that determines whether or not a workman is totally and permanently disabled, but, rather, total and permanent disability contemplates the inability of the workman to perform any work in which he has experience or the capacity to perform. *Craig v. American Community Stores Corp.*, 205 Neb. 286, 287 N.W.2d 426 (1980); *Camp v. Blount Bros. Corp.*, 195 Neb. 459, 238 N.W.2d 634 (1976).

There was sufficient evidence to support each of the findings of the Workmen's Compensation Court; therefore, we must affirm.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL R. BUCHANAN, APPELLANT.

312 N.W.2d 684

Filed November 25, 1981. No. 43941.

1. **Jury Instructions: Appeal and Error.** Failure to object timely to a jury instruction prohibits a party on appeal from contending the instructions were erroneous.
2. ____:____. A party who desires more precise jury instructions must request them at the time the instructions are being considered and not on appeal.
3. ____:____. If the court has instructed the jury generally on the law of the case and has not withdrawn any essential issues from consideration

of the jury, error cannot be predicated on some particular phase of the case unless proper instructions have been requested by the party complaining.

4. **Convictions.** A conviction may be sustained if the defendant's guilt is established beyond a reasonable doubt from all the evidence in the case, including such reasonable inferences as seem justified in the light of the trier of facts' own experience.
5. **Circumstantial Evidence.** One accused of a crime may be convicted on the basis of circumstantial evidence if, taken as a whole, the evidence establishes guilt beyond a reasonable doubt. The State is not required to disprove every hypothesis but that of guilt.
6. **Directed Verdict.** It is only where there is a total failure of competent proof in a criminal case to support a material allegation in the information, or where the testimony adduced is of so weak or doubtful a character that a conviction based thereon could not be sustained, that the trial court will be justified in directing a verdict of not guilty.

Appeal from the District Court for Nemaha County: WILLIAM F. COLWELL, Judge. Affirmed.

Allen Fankhauser of Kotouc, Kotouc, Fankhauser & Maschman for appellant.

Paul L. Douglas, Attorney General, and Dale D. Brodkey for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, and HASTINGS, JJ.

KRIVOSHA, C.J.

The appellant, Michael R. Buchanan, was convicted of one count of delivery of a controlled substance and one count of manslaughter. He was thereafter sentenced to a term of 1 year's imprisonment in the Nebraska Penal and Correctional Complex for the unlawful delivery of a controlled substance, and not less than 2 nor more than 10 years' imprisonment in the Nebraska Penal and Correctional Complex for the commission of manslaughter. He has appealed from that judgment and sentence. His assignments of error, though several in number, are essentially but two. The first claim is that the evidence offered to establish the commission of manslaughter was insufficient, thereby entitling Buchanan to a directed verdict of acquittal.

Buchanan further maintains that certain of the instructions given by the trial court were erroneous. The record reflects that Buchanan made no objection to the instructions and did not tender any instruction with regard to the matters claimed to be in error. We have examined the record and concluded that there is no error and that the judgment and sentence should be affirmed.

The facts in the case are fairly without dispute and paint a picture of a tragically wasteful day of drinking and drugs which ultimately led to the unnecessary and untimely death of one Jack Belcher. The evidence discloses that Belcher worked at the Cooper Nuclear Plant near Brownville, Nebraska, and lived at a motel in Auburn, Nebraska, with Leonard Wagner, the chief witness for the State. During the day and evening immediately prior to Belcher's death the evidence discloses that Belcher had been drinking, smoking marijuana, and using "green and red pills." According to Wagner, Buchanan and someone else referred to only as "a friend" gave a drug described as ethchlorvynol to Belcher in the form of Placidyl, a prescription capsule sleeping pill.

Wagner testified that about 8 p.m. Belcher, David Isbell, and appellant went into the bathroom together and came out together, and Belcher was "high as a kite and laughing and staggering . . . ." About a half hour later Belcher, Isbell, and Buchanan again entered the bathroom. This time Wagner followed them into the bathroom. Wagner observed Belcher sitting on the toilet with a needle in his arm, Isbell manipulating the needle, and Buchanan holding Belcher's arm. Wagner testified that the syringe was red from the mixing of the drug with blood, and fluid was being injected into Belcher's arm. Immediately after the injection, Belcher turned blue, started shaking, and made snorting noises. He then lost consciousness for a short period of time and slid off the toilet and became incoherent.

At that point Wagner put Belcher to bed and ordered everyone else to leave. At about 9 p.m. Belcher told Wagner he felt very sick and shortly thereafter began vomiting. Later he again became ill, this time not only vomiting, but his "bowels were running." At that time Wagner contacted other men with whom he worked, who called an ambulance.

After Belcher was taken away in the ambulance Wagner went to Buchanan's room to ask him for the pills Belcher had been given by Buchanan so that an antidote could be found. Buchanan gave him a pill which was later given to the police.

When the police later came into Belcher's motel room with Wagner, Wagner removed a wastebasket from the bathroom. The wastebasket contained a syringe which was later identified and introduced in evidence. Wagner's testimony was corroborated by an investigator with the Auburn Police Department who searched the room. The syringe contained a liquid identified as ethchlorvynol. Furthermore, evidence was introduced which identified the "green pill" which Wagner had obtained from Buchanan as a Placidyl capsule which contained ethchlorvynol.

The emergency room doctor on duty at the Nemaha County Hospital attempted unsuccessfully to save Belcher's life. Soon after Belcher arrived at the hospital, his heart stopped and he quit breathing. The physician attempted resuscitation for 20 to 25 minutes and administered antidote drugs. Certain physical tests were also made before Belcher's death in order to determine the cause of his condition.

The physician determined that Belcher died of pulmonary edema, which is excess fluid in the lungs, with secondary cardiac failure from the inability to oxygenate the heart. He was of the opinion that the cause of the pulmonary edema was "an overdose of drugs."

An autopsy was later performed on Belcher. The pathologist who performed the autopsy testified that

the most significant findings he made from his external examination were the presence of recent needle puncture wounds in the skin on the inside of each elbow. There were three on the right arm and two on the left. In the pathologist's view the cause of death was "the result of adverse reaction to multiple drugs administered intravenously, giving rise to the reaction resulting in acute cardiac failure with the pulmonary edema and congestion." Specifically, the pathologist testified that the cause of Belcher's death was "an adverse reaction to these drugs given intravenously which in all three of the drugs are normally taken by mouth, which preparations are not made to be given intravenously and, that, coupled with shooting them intravenously, provoked in this particular individual the adverse reaction leading to his acute heart failure with the pulmonary edema and death."

We turn first to the objection raised by Buchanan that there was error in the instructions. As earlier noted, the record discloses that no objections were made to the instructions nor were any other instructions tendered to the court by Buchanan. We have frequently held that failure to object timely to a jury instruction prohibits a party on appeal from contending the instructions were erroneous. See *State v. Tiff*, 199 Neb. 519, 260 N.W.2d 296 (1977). And a party who desires more precise jury instructions must request them at the time the instructions are being considered and not on appeal. *State v. Lynch*, 196 Neb. 372, 243 N.W.2d 62 (1976). Furthermore, a reading of the instructions tendered by the court, taken as a whole, as they must be taken, discloses that the instructions followed the language of the statute. If the court has instructed the jury generally on the law of the case and has not withdrawn any essential issue from consideration of the jury, error cannot be predicated on some particular phase of the case unless proper instructions have been requested by the party complaining. *State v. Ford*, 186 Neb. 109, 180 N.W.2d

922 (1970). The trial court instructed the jury in the language of the statute. That is all that is required in a criminal case, absent a more specific request. See, *State v. Gallegos*, 193 Neb. 651, 228 N.W.2d 615 (1975); *State v. Sukovaty*, 178 Neb. 779, 135 N.W.2d 467 (1965). Buchanan's contention that the instructions were erroneous is without merit and must be overruled.

We turn then to Buchanan's remaining assignment of error, to wit, that the evidence was insufficient to submit the case to the jury. Buchanan argues that the State's evidence is principally circumstantial and that the State has failed to disprove every hypothesis of nonguilt, thereby requiring the trial court to direct a verdict of acquittal. While some decisions of this court may be found which create some confusion as to the State's burden in such a case, the better reasoned decisions of both this court and other courts, including the U.S. Supreme Court, which have written on this matter are to the contrary. See, *Holland v. United States*, 348 U.S. 121, 75 S. Ct. 127, 99 L. Ed. 150 (1954); *State v. Payne*, 205 Neb. 522, 289 N.W.2d 173 (1980).

In *United States v. Nelson*, 419 F.2d 1237 (9th Cir. 1969), the Court of Appeals held that a conviction may be sustained if the defendant's guilt is established beyond a reasonable doubt from all the evidence in the case, including such reasonable inferences as seem justified in the light of the trier of facts' own experience.

In rejecting the claim that the prosecution must disprove every hypothesis but that of guilt, the Court of Appeals said: "The 'reasonable hypothesis' test was formulated for the evaluation of circumstantial evidence; it is often referred to as the 'circumstantial evidence test.' *See, e.g.*, Comment, Sufficiency of Circumstantial Evidence in a Criminal Case, 55 Colum. L. Rev. 549 (1955). As we have noted, the Supreme Court rejected the test in *Holland* on the premise that there is no essential difference in the mental processes required of the jury in weighing direct and circum-

stantial evidence. As to both, 'the jury must use its experience with people and events in weighing the probabilities. If the jury is convinced beyond a reasonable doubt, we can require no more.' Holland, 348 U.S. at 140, 75 S. Ct. at 138.

". . . The required degree of probability is reached if the jury is free of 'the kind of doubt that would make a person hesitate to act' in the more serious and important affairs of his own life. Holland v. United States, *supra*, 348 U.S. at 140, 75 S. Ct. at 138.

. . . .

"The 'reasonable hypothesis' test does not reflect what juries and reviewing courts in reality do. Juries constantly convict, and the convictions are duly affirmed, on evidence upon which none would hesitate to act but which cannot be said to exclude as a matter of inexorable logic, every reasonable hypothetical consistent with innocence.

"Moreover, the impression left by appellate court opinions is that the 'reasonable hypothesis' standard may lead to serious departures from the proper appellate role in evaluating the sufficiency of evidence. Courts following the rule exhibit a noticeable tendency to divide the evidence into separate lines of proof, and analyze and test each line of proof independently of others rather than considering the evidence as an interrelated whole. The sufficiency of the evidence is often tested against theoretical and speculative possibilities not fairly raised by the record, and inferences are sometimes considered which, though entirely possible or even probable, are drawn from evidence which the jury may have disbelieved." *Nelson*, *supra* at 1244-45.

Circumstantial evidence is entitled to be treated by the trier of facts in the same manner as direct evidence. In *People v. Johnson*, 83 Mich. App. 1, 17, 268 N.W.2d 259, 268 (1978), the Michigan Supreme Court said: "'First, we believe that the implied distrust of circumstantial evidence is not warranted. Whether the evi-

dence is "direct" or "circumstantial", we would not allow a conviction if we felt that the evidence was not sufficient to prove guilt beyond a reasonable doubt. To the extent that the rule requires the prosecution to disprove all negative theories, the test could never be met, even by direct evidence. Even with eye-witness testimony there are always innocent theories which are not specifically disproven. There will always be a chance that an eye-witness is honestly mistaken about identification.'"

The Michigan court stated that it should be sufficient if the prosecution proves its own theory beyond a reasonable doubt in the face of whatever contradictory evidence the defense may produce, and held that the standard, therefore, would be whether the evidence presented by the prosecution justifies a reasonable person in concluding that all elements of the crime were established beyond a reasonable doubt.

Also in *United States v. Nelson*, 419 F.2d 1237 (9th Cir. 1969), the U.S. Court of Appeals was called upon to review the applicability of circumstantial evidence in a criminal case. It said: "For at least a third of a century this court has rejected the notion that it is improper to infer a fact at issue from other facts which have been established by circumstantial evidence. E. K. Wood Lumber Co. v. Andersen, 81 F.2d 161, 166 (9th Cir. 1936); Ross v. United States, 103 F.2d 600, 606 (9th Cir. 1939); Fegles Construction Co. v. McLaughlin Construction Co., 205 F.2d 637, 639-640 (9th Cir. 1953); Toliver v. United States, 224 F.2d 742, 745 (9th Cir. 1955); Medrano v. United States, 315 F.2d 361, 362 (9th Cir. 1963); Devore v. United States, 368 F.2d 396, 399 (9th Cir. 1966). As Professor Wigmore has said, '[t]here is no such orthodox rule; nor can be. If there were, hardly a single trial could be adequately presented.' 1 Wigmore, Evidence, § 41, at 435 (3rd ed. 1940).

"The error in this discredited doctrine is clearly reflected in the defendant's formulation: it assumes that

a fact established by circumstantial evidence is not a 'proven fact.' But as we have repeatedly said, circumstantial evidence is not inherently less probative than direct evidence. Under some conditions it may even be more reliable, as this case illustrates.

. . . .

"Of course either direct or circumstantial evidence may fail to prove the fact in issue—direct evidence because the credibility of the witness is destroyed; circumstantial evidence for that reason, or because the inference from the proven circumstances to the fact in issue is too speculative, or remote. Whether such a failure has occurred is an appropriate inquiry in any case—be the evidence direct, circumstantial, or both. But since under some conditions circumstantial evidence may be equally or more reliable than direct evidence, it would be wholly irrational to impose an absolute bar upon the use of circumstantial evidence to prove any fact, including a fact from which another fact is to be inferred." *Nelson, supra* at 1239-40.

We believe that we must once and for all abandon any notion that before an accused may be convicted on the basis of circumstantial evidence alone, the State must disprove every hypothesis but that of guilt. One accused of a crime may be convicted on the basis of circumstantial evidence if, taken as a whole, the evidence establishes guilt beyond a reasonable doubt. The State is not required to disprove every hypothesis but that of guilt. See, *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *United States v. Carlson*, 547 F.2d 1346 (8th Cir. 1976).

To the extent that what we have previously said regarding a requirement that the State must disprove every hypothesis but that of guilt is inconsistent with our holding in this case, it is overruled.

There is no question that Buchanan committed an unlawful act in delivering a controlled substance. He admitted that to Wagner when Wagner asked him to provide him with the pills which he had given to

Belcher. The question then is whether the delivery of that pill was either the proximate cause or a proximate cause of Belcher's death. If the evidence was sufficient to support a jury's finding beyond a reasonable doubt that the delivery by Buchanan to Belcher of an unlawful controlled substance was one of the proximate causes of his death, then the evidence was sufficient to submit the case to a jury. We have frequently said: "In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact, and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it." *State v. Carter*, 205 Neb. 407, 409, 288 N.W.2d 35, 36 (1980). See, also, *State v. Muniz*, 203 Neb. 206, 277 N.W.2d 712 (1979). Moreover, we have said: "It is only where there is a total failure of competent proof in a criminal case to support a material allegation in the information, or where the testimony adduced is of so weak or doubtful a character that a conviction based thereon could not be sustained, that the trial court will be justified in directing a verdict of not guilty." *State v. Webb*, 197 Neb. 662, 664, 250 N.W.2d 625, 627 (1977).

It was therefore for the triers of fact, in view of the medical testimony in this case, to determine from the evidence whether the delivery by Buchanan to Belcher of an illegal controlled drug was one of the proximate causes of his death. In *State v. Lytle*, 194 Neb. 353, 358, 231 N.W.2d 681, 685-86 (1975), we said: "'The proximate cause of a death is that cause which, in natural and continuous sequence, unbroken by an efficient intervening cause, produces the death, and without which the result would not have occurred. It is the efficient cause, the one that necessarily sets in operation the factors that accomplish the death. * * *

"'An efficient intervening cause is a new and in-

dependent cause, itself a proximate cause of the death, which breaks the causal connection between the original illegal act and the death.'"

And in *State v. Harris*, 194 Neb. 74, 81, 230 N.W.2d 203, 207 (1975), we said: "'[T]he acts of two or more persons may work concurrently as the efficient cause of a death, and in such a case, each of the participating acts is regarded in law as a proximate cause.'"

The jury could reasonably find beyond a reasonable doubt that the delivery of ethchlorvynol to Belcher by Buchanan and injected into Belcher was the proximate cause of his death. Almost immediately after the injection Belcher reacted negatively. He became unconscious. He then went from unconsciousness to violent illness and in several hours he died. There was no evidence of any intervening cause between the time the drug was injected into Belcher and his death. The fact that Belcher may have taken other drugs earlier does not aid Buchanan. The evidence supports the claim that Belcher had ethchlorvynol in his system at the time of his death, that the syringe found in Belcher's room contained ethchlorvynol, and that, according to the pathologist, Belcher died from an adverse reaction to the drugs, including ethchlorvynol. Furthermore, the emergency room physician's testimony is not inconsistent with that of the pathologist. He maintained that the cause of death was "an overdose of drugs," including the ethchlorvynol. Both the emergency room physician and the pathologist stated that the cause of death was drug-related. The jury could, as reasonable persons, find beyond a reasonable doubt that the proximate cause or one of the proximate causes of Belcher's death was the unlawful delivery by Buchanan to Belcher of ethchlorvynol injected into his arm. The evidence was sufficient to submit the case to the jury and Buchanan's assignment of error in that regard must likewise be rejected. The judgment of conviction

and the sentences imposed are in all respects correct and must be affirmed.

AFFIRMED.

BOSLAUGH, J., dissenting in part.

While I concur in the judgment of the court, I do not concur in that part of the opinion which attempts to restate the circumstantial evidence rule.

There is no burden upon the State to disprove any hypothesis of nonguilt. The burden upon the State is to prove the defendant guilty of the crime charged beyond a reasonable doubt. When the State relies upon circumstantial evidence to prove the defendant's guilt, a determination must be made whether the inferences which can be drawn by the trier of fact from that evidence, together with all the other evidence, are sufficient to permit a finding of guilt beyond a reasonable doubt.

If the inferences to be drawn from particular facts are equally consistent with guilt or innocence, then it should be clear that those facts alone are not sufficient to support a finding of guilt beyond a reasonable doubt. It is only when the inference of guilt is stronger than any reasonable inference of nonguilt that the evidence presents a question for the trier of fact and will sustain a finding of guilt.

It seems to me a statement that an accused may be convicted "on the basis of circumstantial evidence if, taken as a whole, the evidence establishes guilt beyond a reasonable doubt" is incomplete and misleading unless it is accompanied by a statement which incorporates the requirement that, among permissible inferences, the inference of guilt must be stronger than any reasonable inference of nonguilt.

ROBERT EUGENE WHITED, APPELLANT, V. JERRY J. BOLIN ET AL., APPELLEES.

312 N.W.2d 691

Filed November 25, 1981. No. 43944.

1. **Board of Pardons: Statutes: Sentences.** Approval of the Board of Pardons to apply 1975 Neb. Laws, L.B. 567, retroactively is required only where the changes in L.B. 567 would result in discharge of the petitioner from custody at an earlier date than under the law in effect prior to L.B. 567.
2. ____: ____: ____. Where a petitioner, under a sentence imposed prior to August 24, 1975, has been granted good time credits which remain unforfeited, sufficient under prior law to require his mandatory release from the custody of the Department of Correctional Services under supervision on the same date or prior to the date when his discharge from the custody of the state would have become mandatory under the provisions of 1975 Neb. Laws, L.B. 567, consent of the Board of Pardons is not required to apply the provisions of L.B. 567 retroactively.
3. **Statutes: Sentences.** The provisions of Neb. Rev. Stat. § 83-1,110(2) (Reissue 1976) are to be applied to consecutive sentences whether imposed before or after the effective date of 1975 Neb. Laws, L.B. 567.

Appeal from the District Court for Lancaster County: HERBERT A. RONIN, Judge. Affirmed in part, and in part remanded with directions.

Dennis R. Keefe, Lancaster County Public Defender, and Richard L. Goos for appellant.

Paul L. Douglas, Attorney General, and J. Kirk Brown for appellees.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

MCCOWN, J.

This is a habeas corpus proceeding in which the petitioner sought immediate release from penal custody of the State of Nebraska. The District Court dismissed the petition and this appeal followed.

In January 1967 the petitioner commenced serving a 10-year sentence for burglary in the custody of the Department of Correctional Services. On February 1,

1973, the petitioner was sentenced to a term of not less than 3 nor more than 10 years for burglary, to be served consecutively to the 1967 sentence. The first sentence was terminated by the state on August 19, 1973, and on that date petitioner began serving the second term.

In 1975, L.B. 567 became effective. L.B. 567 made changes in the application of "good time" and "good behavior" good time credits, both for purposes of determining eligibility for release on parole and for purposes of determining the time of mandatory discharge from custody.

On September 13, 1978, the petitioner was granted a discretionary parole. On November 18, 1978, petitioner was convicted and fined in the municipal court of Lincoln, Nebraska, on a charge of refusing a breath test. It is stipulated that on December 13, 1978, the Board of Pardons denied the petitioner the application of good time benefits under L.B. 567. The petitioner did not receive prior notification of the board meeting, nor have any opportunity to be heard. On December 19, 1978, petitioner's discretionary parole was revoked and he has remained in custody.

Petitioner's habeas corpus petition was filed on July 20, 1979. The petition alleged that he had been denied his statutory rights to good behavior good time credits in violation of law and had also been denied his constitutional right to due process and equal protection of the law. He alleged that he was entitled to immediate release from custody. The State's response alleged that the petitioner had violated a discretionary parole within 12 months of the date when his parole would otherwise have been mandatory and that the petitioner was not entitled to the retroactive application of 1975 Neb. Laws, L.B. 567.

On September 10, 1980, the District Court found that *Johnson & Cunningham v. Exon*, 199 Neb. 154, 256 N.W.2d 869 (1977), requires the approval of the Board of Pardons before an inmate may enjoy "the more liberal good time benefits afforded by LB 567," and also

found that as to the action of the Board of Pardons petitioner's right to due process of law had not been violated, and dismissed his petition.

In *Johnson & Cunningham v. Exon, supra,* this court determined that where petitioners became eligible for earlier discharge under L.B. 567 than would have resulted under laws existing at the time of sentencing, approval of the Board of Pardons was required before the provisions of L.B. 567 could be applied retroactively. The basis for the holding was that an earlier discharge constituted a form of clemency or commutation of sentence which only the Board of Pardons had the power to exercise.

In *Gochenour v. Bolin,* 208 Neb. 444, 303 N.W.2d 775 (1981), this court held that approval of the Board of Pardons to apply L.B. 567 retroactively is required only where the changes in L.B. 567 would result in discharge of the prisoner from custody at an earlier date than under the law in effect prior to L.B. 567.

At this point it is necessary to point out that since 1969 the maximum amounts of "good time" allowances and of "meritorious" or "faithful performance" good time allowances have been exactly the same, except that L.B. 567 provided that an offender *"shall* receive, for faithful performance of his assigned duties," 5 days for each month of his term, while prior law provided that an offender *may* receive a reduction not to exceed 5 days for any month of imprisonment. (Emphasis supplied.) In the usual situation the amount of good time allowances is the same under L.B. 567 and prior law, and has been since 1969.

The only essential difference in the usual case is that L.B. 567 requires the good time reductions to be deducted from the maximum term to determine the date when the prisoner's discharge from the custody of the state becomes mandatory, while prior law requires such reductions to be deducted from the maximum term to determine the date when the prisoner's release under supervision becomes mandatory. In the usual case the

prisoner is required to be discharged from custodial confinement at the same time under either law.

Where a petitioner, under a sentence imposed prior to August 24, 1975, has been granted good time credits which remain unforfeited, sufficient under prior law to require his mandatory release from the custody of the Department of Correctional Services under supervision on the same date or prior to the date when his discharge from the custody of the state would have become mandatory under the provisions of 1975 Neb. Laws, L.B. 567, consent of the Board of Pardons is not required to apply the provisions of L.B. 567 retroactively.

In the case at bar, however, the facts establish that the petitioner violated the terms of a discretionary parole in November 1978 at a time when his mandatory parole under prior law was November 14, 1979. The law in effect at the time of sentencing and under which the mandatory parole date had been computed provided: "Nothing herein shall require the mandatory parole of an offender who has violated a discretionary parole within twelve months of the date when his parole would otherwise be mandatory." Neb. Rev. Stat. § 83-1,111(5) (Cum. Supp. 1974). The record, therefore, establishes that the petitioner would be released from custodial confinement under the application of the provisions of L.B. 567 at an earlier date than he would have been under the prior law in effect at the time of his sentencing. The approval of the Board of Pardons was therefore required to apply L.B. 567 retroactively.

It is quite clear that the actions of the Board of Pardons in allowing or denying the benefits of L.B. 567 constitute an exercise of its power to grant clemency or commutation rather than the revocation of clemency or commutation previously granted. The exercise or nonexercise of a discretionary power to grant clemency is not subject to ordinary due process requirements. See, for example, *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 99 S. Ct. 2100, 60 L. Ed. 2d 668 (1979). It should be noted here that the action or inaction of the Board of

Pardons in the present situation is separate and distinct from any action or inaction of the Board of Parole under the provisions of L.B. 567. Petitioner does not raise any due process issue with respect to the action of the Board of Parole in this case, nor do we pass on such issues here.

Finally, the petitioner contends that the District Court erred in failing to require the respondents to compute the prison terms of the petitioner in accordance with Neb. Rev. Stat. § 83-1,110(2) (Reissue 1976). That section provides: "Every committed offender sentenced to consecutive terms, whether received at the same time or at any time during the original sentence, shall be eligible for release on parole when he shall have served the total of the minimum terms, less reductions granted in accordance with the provisions of this act. The maximum terms shall be added to compute the new maximum term, which, less reductions granted in accordance with the provisions of this act, shall determine the date when his discharge from the custody of the state becomes mandatory." In *Gochenour v. Bolin*, 208 Neb. 444, 303 N.W.2d 775 (1981), this court held that the provisions of § 83-1,110(2) are to be applied to consecutive sentences whether imposed before or after the effective date of L.B. 567.

The record in the present case shows that the state did not combine the minimum and maximum terms of the two prison sentences as required by that section, but it also shows that the first of the two sentences was terminated on August 19, 1973, and that on that date the petitioner began serving the second term. If the sentences had been combined as required by law it is obvious that the termination of the first 10-year sentence would operate as credit of 10 years upon the combined maximum term of 20 years. For all practical purposes the only issue here is whether the good time provisions for the first 3 years following August 19, 1973, were computed on the basis of the commencement of a new term or as a continuation of the combined term. The record does not disclose that information. Neither

does the record show that any action was ever taken to forfeit any of petitioner's good time credits, either before or after December 19, 1978, the date when petitioner's discretionary parole was revoked.

The case is therefore affirmed in part and in part remanded to the District Court with directions to require respondents to combine the minimum and maximum terms of petitioner's sentences in accordance with § 83-1,110(2), and to compute the amounts of good time credited or forfeited, and to determine the date for mandatory release from custodial confinement.

AFFIRMED IN PART, AND IN PART REMANDED WITH DIRECTIONS.

LEROY BRISTOL, JR., APPELLANT, V. JOHN HANLON, COMMISSIONER OF LABOR, STATE OF NEBRASKA, AND J. F. O'NEILL PACKING COMPANY, APPELLEES.

312 N.W.2d 694

Filed November 25, 1981. No. 44242.

1. **Administrative Hearings: Appeal and Error.** An appeal from a decision of the Nebraska Appeal Tribunal on an employment compensation claim is considered by both the District Court and this court de novo on the record.
2. ____: ____. The review de novo on the record is limited to and governed by the standards of the Administrative Procedures Act.
3. **Employer and Employee: Words and Phrases.** Misconduct has been defined by various courts as a deliberate, willful, or wanton disregard of an employer's interest or of the standards of behavior which the employer has a right to expect of his employees, or carelessness or negligence of such a degree or recurrence as to manifest culpability, wrongful intent, or evil design.

Appeal from the District Court for Douglas County: SAMUEL P. CANIGLIA, Judge. Affirmed.

Ida M. Jones for appellant.

Pamela A. Mattson for appellee Hanlon.

Clayton Byam for appellee J. F. O'Neill Packing Co.

Submitted without oral argument. KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

KRIVOSHA, C.J.

The appellant, LeRoy R. Bristol, Jr. (Bristol), appeals from an order entered by the District Court for Douglas County, Nebraska, affirming a previous order entered by the appeal tribunal of the Nebraska Department of Labor finding that Bristol had been discharged for misconduct in connection with his employment at J. F. O'Neill Packing Company. We believe the trial court was correct and accordingly affirm its decision.

The evidence reflects that on March 7, 1980, Bristol was employed by the J. F. O'Neill Packing Company. J. F. O'Neill Packing Company conducts a small, beef slaughtering business in Omaha, Nebraska, and all the employees who work on the kill floor are trained to perform more than one job. Although Bristol was then employed as a "head washer," he had also been trained to remove the hides of beef carcasses.

On March 7, 1980, an employee who regularly removed the hides injured his hand. As a result Bristol was reassigned to perform that task. He had recently performed the job for a full 2-week period and had been trained to perform the work. Apparently the important aspect of this job is to remove the hide with as few cuts as possible so that the hide may thereafter be used for commercial purposes.

The evidence discloses that soon after Bristol replaced the injured employee he began making 12-inch-long cuts in the hides with his knife. Everyone, including Bristol, conceded that such cuts were improper and tended to destroy the value of the hides. Another employee working near Bristol observed these cuts and warned Bristol at least three times to stop making such reckless cuts. Bristol's response was to shout obscenities at the employee and continue making the cuts in the

same fashion as he had prior to the warnings.

At that time Michael O'Neill, vice president of J. F. O'Neill Packing Company, arrived on the kill floor and observed Bristol making the long cuts in the hides. O'Neill concluded that because Bristol had worked for the company for almost 3 years, was considered to be a good butcher by the company, and was fully aware of his duty to avoid cutting the hides, it was apparent Bristol was intentionally destroying the hides. O'Neill directed the company foreman to fire Bristol at once.

After a hearing on the incident, the claims deputy of the Nebraska Department of Labor determined that Bristol had intentionally destroyed the hides and that he was discharged by the company for misconduct pursuant to Neb. Rev. Stat. § 48-628(b) (Reissue 1978). Accordingly, the claims deputy assessed an 8-week disqualification of unemployment benefits in the amount of $848, reducing the amount of unemployment compensation Bristol received to $1,908.

Bristol appealed this determination to the appeal tribunal of the Nebraska Department of Labor, and after a hearing on the merits the Nebraska Appeal Tribunal affirmed the claims deputy's determination. Thereafter, Bristol petitioned the District Court for Douglas County, Nebraska, for judicial review. Trial was held on February 4, 1981, and on March 10, 1981, the District Court affirmed the decision of the Nebraska Appeal Tribunal. The principal question presented to this court is whether the evidence was sufficient to support a finding that Bristol acted intentionally when cutting the hides and not simply as a result of inefficiency or poor performance. While it is true that an appeal from a decision of the Nebraska Appeal Tribunal on an employment compensation claim is considered by both the District Court and this court de novo on the record (*Powers v. Chizek*, 204 Neb. 759, 285 N.W.2d 501 (1979)), it is likewise true that the review de novo on the record is limited to and governed by the standards of the Administrative Procedures Act. See

Neb. Rev. Stat. §§ 84-901 to 84-919 (Reissue 1976). Specifically, § 84-917(6)(e) and (f) provides that the court may reverse or modify the decision "if the substantial rights of the petitioner may have been prejudiced because the agency decision is: . . . (e) Unsupported by competent, material, and substantial evidence in view of the entire record as made on review; or (f) Arbitrary or capricious."

The other subparts of § 84-917(6) are not at all relevant to this review. See *Gosney v. Department of Public Welfare*, 206 Neb. 137, 291 N.W.2d 708 (1980).

Pursuant to that standard we have now examined the entire record, and while there is testimony offered by Bristol himself that his actions were not intentional, the overwhelming weight of the evidence is to the contrary. Bristol clearly understood the nature of his job and how to properly perform it. Though he knew he was damaging the hides, he made no effort to correct his behavior, to seek help or assistance, or to evidence any remorse about his action. He apparently was not very happy about having been put on this job and was evidencing his unhappiness by his lack of concern for his work.

Neb. Rev. Stat. § 48-628(b) (Reissue 1978) provides that an individual shall be disqualified for benefits "(b) For the week in which he has been discharged for misconduct connected with his work, if so found by the commissioner, and for not less than seven weeks nor more than ten weeks which immediately follow such week, as determined by the commissioner in each case according to the seriousness of the misconduct . . . ." Indeed, the Commissioner may, if he finds that the misconduct was gross, flagrant, and willful, or was unlawful, deny the individual *any* benefits with respect to wage credits earned prior to such misconduct. See § 48-628(b).

While it appears that this court has not had an occasion to define the term "misconduct" under the Nebraska Employment Security Law, several other

courts have. Their decisions are helpful to us in deciding this case. Misconduct has been defined by various courts as a deliberate, willful, or wanton disregard of an employer's interest or of the standards of behavior which the employer has a right to expect of his employees, or carelessness or negligence of such a degree or recurrence as to manifest culpability, wrongful intent, or evil design. See, *Fitzgerald v. Globe-Union, Inc.*, 35 Wis. 2d 332, 151 N.W.2d 136 (1967); *Boynton Cab Co. v. Neubeck*, 237 Wis. 249, 296 N.W. 636 (1941); *Marlette Homes, Inc. v. Employment Division*, 33 Or. App. 547, 577 P.2d 89 (1978); *Erickson v. Employment Division*, 29 Or. App. 893, 565 P.2d 1101 (1977); *Van Horn v. Employment Division*, 26 Or. App. 63, 552 P.2d 264 (1976); *Markley v. Com., Unemp. Comp. Bd. of Review*, 47 Pa. Commw. Ct. 148, 407 A.2d 144 (1979); *Culbreath v. Com., Unemploy. Comp. Bd. of R.*, ____ Pa. Commw. Ct. ____, 426 A.2d 1267 (1981).

We are unable to say, as a matter of law, that the action of the appeal tribunal is unsupported by competent, material, and substantial evidence in view of the entire record, or is arbitrary or capricious.

The record appears totally devoid of any explanation by Bristol as to the reason for his behavior, particularly in view of the fact that he was aware of the seriousness of his action and had been warned by a fellow employee. We believe that the decision of the District Court affirming the finding of the appeal tribunal should be affirmed.

AFFIRMED.

DANNY L. SCHLEICH, APPELLEE, V.
BETTY J. SCHLEICH, APPELLANT.

313 N.W.2d 29

Filed November 25, 1981. No. 44303.

Appeal from the District Court for Platte County: JOHN C. WHITEHEAD, Judge. Affirmed.

Grady, Caskey & Thor for appellant.

Mark M. Sipple of Luckey, Sipple & Hansen for appellee.

Submitted without oral argument. KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

PER CURIAM.

The instant appeal involves a domestic relations matter.

The court, having reviewed the record in this case de novo, agrees with the result reached by the trial court. The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ARMANDO L. YBANEZ, APPELLANT.

313 N.W.2d 30

Filed November 25, 1981. No. 44344.

1. **Search Warrants.** To support a search warrant, only the probability of criminal activity must be shown.
2. **Search Warrants: Affidavits.** Affidavits for search warrants must be tested and interpreted in a commonsense and realistic fashion.
3. **Search Warrants.** Information supplied by a citizen who voluntarily comes forward to aid law enforcement officers is presumed to be reliable.

Appeal from the District Court for Douglas County: PAUL J. HICKMAN, Judge. Affirmed.

Albert A. Pena III and James S. Jansen for appellant.

Paul L. Douglas, Attorney General, and Marilyn B. Hutchinson for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and HASTINGS, JJ.

BOSLAUGH, J.

After a trial to the court, the defendant was convicted of possession of cocaine and sentenced to imprisonment for 1 to 2 years. He has appealed and contends the trial court erred in failing to sustain his motion to suppress; in failing to elicit an affirmative waiver of his right to confrontation; and in finding the defendant guilty when there was no evidence that the substance seized in the search of the defendant's motel room was in fact cocaine.

During a search of the defendant's motel room, pursuant to warrant, approximately 3 ounces of cocaine were found concealed behind the headboard of the bed in which the defendant had been sleeping. The search warrant had been obtained after the defendant's companion, Harry Ihms, had been arrested for carrying a concealed weapon. Ihms had been stopped by the police for questioning after a citizen had reported that Ihms resembled a person wanted for bank robbery in Colorado. The concealed weapon was found during a limited search of Ihms' person.

The warrant authorized a search of the motel room occupied by the defendant and Ihms to discover currency taken in the bank robbery, a jacket, mask, and bag used in the robbery, and ammunition.

The defendant has attempted to question the legality of the arrest of Ihms, but he has no standing to raise that issue. See *State v. Van Ackeren*, 194 Neb. 650, 235 N.W.2d 210 (1975).

The affidavit for the search warrant set out all the information then in the possession of the officers, including confirmation of the description of the bank robber obtained by the Omaha police from Colorado police officers and agents of the Federal Bureau of Investigation.

In *State v. Stickelman*, 207 Neb. 429, 433, 299 N.W.2d 520, 523 (1980), this court said: "[I]n evaluating the showing of probable cause necessary to support a search warrant, only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause. . . . [A]ffidavits for search war-

rants must be tested and interpreted in a commonsense and realistic fashion; and . . . where the circumstances are detailed, where reasons for crediting the source of information is [sic] given, and when the magistrate has found probable cause to exist, the court should not invalidate the warrant by interpreting the affidavit in a hyper-technical manner." In *State v. King*, 207 Neb. 270, 273, 298 N.W.2d 168, 170 (1980), we stated, citing *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964): "'[W]hen a search is based upon a magistrate's, rather than a police officer's, determination of probable cause, the reviewing courts will accept evidence of a less "judicially competent or persuasive character than would have justified an officer in acting on his own without a warrant," [citation omitted] and will sustain the judicial determination so long as "there was substantial basis for [the magistrate] to conclude that narcotics were probably present . . . ." [Citation omitted.]'"

The affidavit in this case contained the information the police had received from the citizen informant, the information that had been obtained from the authorities in Colorado as to the bank robbery, and Ihms' resemblance to the description of the robber. The citizen informant was identified by name and place of residence. As we said in *State v. King, supra* at 275, 298 N.W.2d at 171, with regard to the reliability of citizen informants, "'Reliability still must be shown, but it may appear by the very nature of the circumstances under which the incriminating information became known. Any other rule would lead to the totally unacceptable result that public-spirited citizens interested only in law enforcement could seldom furnish information sufficient to establish probable cause.' . . . 'Information supplied by a citizen who voluntarily comes forward to aid law enforcement officers is presumed to be reliable.'"

Although the cocaine seized during the search was not listed in the warrant, it was discovered during the search for the currency and other items listed in the

warrant. Of necessity, the officers were authorized to search all places in which the articles listed in the warrant might have been concealed.

The other two assignments of error are equally without merit. The parties, in open court, stipulated that the police reports be admitted and constitute the evidence for the trial on the merits. The police reports contain a report of an analysis by the senior chemist at Lutheran Hospital Laboratory which identifies the substance seized as cocaine. The stipulation of the reports into evidence was an effective waiver of the defendant's right of confrontation.

The judgment of the District Court is affirmed.

AFFIRMED.

WHITE, J., participating on briefs.

KARL E. MOMSEN, ADMINISTRATOR OF THE ESTATE OF INEZ G. MOMSEN, DECEASED, APPELLANT AND APPELLEE, V. NEBRASKA METHODIST HOSPITAL ET AL., APPELLEES, AND JAMES R. KOVARIK, M.D., APPELLANT.

313 N.W.2d 208

Filed December 4, 1981. No. 43522.

1. **Trial: Witnesses: Evidence.** Where a party, without reasonable explanation, changes his testimony concerning the material facts on a vital issue, such change clearly being made to meet the exigencies of pending litigation, the testimony is discredited as a matter of law and should be disregarded.
2. ____: ____: ____. In the foregoing situation, it is immaterial whether the contradictory testimony is given in a retrial of the same proceeding, in a pretrial deposition in pending litigation, or in related litigation under the same set of facts. The important considerations are that the testimony pertains to a vital point, that the party clearly made the change to meet the exigencies of the pending case, and that no rational or sufficient explanation for the change in testimony exists.
3. **Medical Malpractice: Negligence.** A patient of a physician or surgeon is entitled to a careful and thorough examination such as the circum-

stances, the condition of the patient, and the physician's opportunity for examination permit. While the doctor does not insure the correctness of his diagnosis, he is required to use reasonable care to determine through examination and diagnosis the condition of the patient and the nature of the ailment.

4. **Evidence.** Where the facts are not in dispute, then ordinarily the evidence should be taken as true.

Appeal from the District Court for Douglas County: JOHN T. GRANT, Judge. Affirmed.

Joe P. Cashen and Neil B. Danberg, Jr., of Kennedy, Holland, DeLacy & Svoboda for appellant Kovarik.

Martin A. Cannon of Matthews & Cannon, P.C., for appellee Momsen.

Law Offices of Sodoro, Daly & Sodoro for appellee Nebraska Methodist Hospital.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

CLINTON, J.

This is an action by the personal representative of the estate of Inez G. Momsen (hereinafter Mrs. Momsen, patient, or personal representative) against defendants James R. Kovarik, a doctor of medicine specializing in obstetrics and gynecology, and the Nebraska Methodist Hospital to recover damages for the death of the patient alleged to have been caused by the negligence of the defendants. The cause was submitted to a jury which rendered a verdict in favor of both defendants. Upon the motion of the personal representative for a new trial, the district judge granted a new trial as to Kovarik and denied the motion as to the hospital. Kovarik appeals from the order granting a new trial. The personal representative appeals from the denial of the new trial as to the hospital. We affirm.

The principal issue in the Kovarik appeal is whether the trial court should have directed a verdict against Kovarik as to certain allegations of negligence because of

changes Kovarik made in his testimony at trial from that to which he testified in a pretrial deposition.

Before discussing the issue with particularity, it is necessary to set forth background information. On the afternoon of November 29, 1974, Kovarik performed a hysterectomy on Mrs. Momsen at the Nebraska Methodist Hospital. At 9 p.m. on the 29th she suffered a cardiac arrest. Resuscitation efforts were only partially successful, and at about 4:25 a.m. on the 30th she died. The autopsy indicated that the death was the result of pulmonary edema.

The petition alleged, among other claimed negligent acts or omissions, that Kovarik failed to "(a) . . . attend decedent and to provide immediate medical evaluation or diagnosis to decedent when he knew or should have known she was suffering from respiratory distress and pulmonary edema; (b) . . . provide adequate and timely medical treatment to decedent for such respiratory distress and pulmonary edema; . . . (h) . . . timely provide qualified medical care or consultation."

The evidence showed that Mrs. Momsen was, except for the complaints which necessitated surgery, in good health. After the surgery she was returned to her hospital room from the recovery room at 4:30 p.m. Prior to that time and up until 6 p.m., all vital signs were normal under the circumstances. The pulse rate varied from 68 to 76 per minute; respiration, 16 to 18 per minute; and blood pressure, 122/90 to 110/66. At 6 p.m. the patient's blood pressure dropped to 90/60. This, however, was no cause for immediate concern. A lowered blood pressure is a normal reaction to a pain-killing drug such as that which the patient had been given at about 4:50 p.m. The patient's breathing at 6:30 p.m., however, was very "moist," and the nurse used suction to remove fluid from her throat intermittently throughout the evening. There was no significant change in the vital signs until 7:15 p.m. when the pulse rate rose to 160 and the blood pressure dropped to 80/60. The attending nurse measured vital signs

every 15 minutes. Thereafter, the vital signs and other symptoms were as follows: 7:30 p.m., pulse, 160; respirations, 52; blood pressure, 76/60. At that time the patient's nails were blue, indicating a deficiency of oxygen in the bloodstream. The nurse testified that at that time she called Kovarik at his home and advised him of the changes in the patient's condition. As Kovarik felt hemorrhage was a likely cause for the changes in vital signs, he requested a hematocrit, a laboratory test which would indicate whether hemorrhage was occurring. He asked the nurse to telephone him when the results were known. He further told her to increase the intravenous fluid flow and to watch the patient closely. The nurse ordered the test and continued monitoring the patient's vital signs every 15 minutes. At 7:45 these were: pulse, 150; respirations, 48; blood pressure 76/60. At 8 p.m.: pulse, 160; respirations, 52; blood pressure 70/40. The nurse testified she called Kovarik at 8 p.m. and gave him the hematocrit result, which was 53 percent, as well as the vital signs information. This result indicated no hemorrhaging. He then told her to continue to watch the patient closely. Kovarik's recollection was somewhat hazy. He thought he had called for the hematocrit results himself sometime between 8 and 8:20 p.m. rather than the nurse calling him as he had requested. In any event, he did not go to the hospital until he received a call from the nurse at about 9:05 p.m. advising him of the cardiac arrest. Kovarik then left home for the hospital, arriving just as the resuscitation team was moving Mrs. Momsen from her room to the intensive care unit.

Various expert witnesses were called by the parties. The personal representative's witnesses, an anesthesiologist and a surgeon, testified that when the 7:30 p.m. vital signs information was given to Kovarik he should have gone at once to the hospital to examine the patient and to attempt a diagnosis. In their opinion all the symptoms, viewed in totality, indicated pulmonary

edema which could have been diagnosed if an examination of the patient would have been made at that time. Kovarik's expert witness, an obstetrician and gynecologist practicing in Omaha, testified on direct examination that Kovarik's responses "would be consistent with the medical judgment of a person practicing obstetrics and gynecology in Omaha." On cross-examination this witness agreed the symptoms at 7:30 p.m. indicated the patient's oxygen exchange was impaired. With reference to a physician's duty to personally attend a patient, the substance of his testimony, again elicited on cross-examination, was that, "under ideal circumstances," after receiving the information at 7:30 p.m. and ordering the hematocrit, the more efficient action would be to go to the hospital, but that "each person has to exercise the medical judgment that he has" under the circumstances. He testified:

"Q . . . If you were the doctor in this case, sir, and got that information, now you tell me true, wouldn't you have got in your car and gone to that Methodist Hospital right then and there?

"A I am not certain. It depends on the information that I received, the laboratory report that I received and how you would approach it from this point.

"Q All right, but you certainly will agree that the best care would involve getting over there to your patient right then and there?

"A I think, at the bottom line, after it is all done, any one of us would have done that, yes."

The witness' attention was then directed to his own deposition given earlier, indicating that the information showed the patient was getting into difficulty, and then he testified as follows:

"A She was in difficulty, yes.

"Q And continuing: 'If the patient were progressing to get into difficulty that either I as a physician or some[one] designated would be asked to see the patient.' That was your testimony in your deposition, is that

right?
"A Yes, sir."
He agreed at that time an undiagnosed medical problem existed.

The defendant hospital called as witnesses two anesthesiologists, one practicing in Omaha and one in Texas. The first witness testified that the pulse rate of 160 recorded at 7:15 p.m. was "alarming," and when considered with the earlier blood pressure drop to 90/60, it indicated a condition of "borderline shock"; that the continued pulse rate of 160 did not indicate stabilization of the patient's condition and the problem needed attention at once; and that if he had gotten "those numbers" he would have felt compelled to go to the hospital immediately. He stated, "There is no substitute for seeing the patient yourself."

The Texas anesthesiologist testified that the symptoms and vital signs most likely indicated pulmonary edema.

The opinions of the experts differed somewhat as to the cause of the respiratory problems as well as the treatment to be applied, as that depended upon the cause. The Omaha anesthesiologist believed the problem was a result of stomach acid which came up and was then breathed into the lungs. If such was the case, the necessary treatment would require the acid be removed from the lungs before positive pressure oxygen was given to treat the edema. Other experts, except the Texas anesthesiologist, thought the edema resulted from a fluid overload. In this event, the proper treatment would be giving oxygen under positive pressure, along with various other measures.

The experts' opinions differed as to the salvageability of the patient's life if early treatment had been rendered after the symptoms appeared. The personal representative's expert indicated Mrs. Momsen could have been saved even as late as 8:30 p.m. or later, while the others indicated the question was unanswerable without significant speculation.

Kovarik's expert indicated, as did the personal representative's experts, that the symptoms called for treatment by either an anesthesiologist or an internal medicine specialist, not an obstetrician-gynecologist. Kovarik himself agreed he could not treat pulmonary edema, but he thought he could diagnose it if he saw a patient so afflicted.

We now turn to Kovarik's testimony concerning the central question of whether the treating physician should have gone to the hospital for purposes of making an examination and attempting diagnosis after the information on symptoms was first received.

As to the information he received in the two conversations with the attending nurse, he testified as follows. First conversation:

"Q Do you recall whether she gave you the information that was contained in the nurse's notes, generally that she had a problem with coughing?

"A Yes, she did.

"Q And —

"A (Interposing) As far as I can recall, she did.

"Q And nasal and throat suction; that she was undertaking suction at that time?

"A That's correct.

"Q Do you recall that she indicated that there was some chest sounds and possibly the nail beds were blue; do you recall that?

"A Yes.

"Q And how about the vital signs?

"A She said she told me and I can't dispute that she may have told me, but I don't remember. I just can't recollect that we talked about that specifically, and she may well have had."

Second conversation:

"A I am sure she did but, again, I can't recall that she did, but I am sure it would have been illogical to even think that either the nurse or I wouldn't have asked or that she wouldn't have told me.

"Q And at that time you told her to continue what she

was doing?
"A Yes, sir.
"Q It was your impression that she was doing better from what she told you, is that correct?
"A She was doing better according to Miss Redding.
"Q Did you give any other instructions, specific instructions, one way or the other to continue doing what she was doing and watch her closely?
"A Again, I don't remember any specific thing, but the logical thing for me to do was say, 'Watch her closely and let me know if there is any change.'
"Q And, as far as your being free to go to the hospital, was there anything to keep you from going to the hospital at that time?
"A Nothing."

The gist of Kovarik's reason for not going to the hospital, according to his testimony at trial, was that since the results of the hematocrit did not indicate bleeding and bleeding was the most obvious postoperative problem, and since she was a little better (this refers to the nurse's statement that she was coughing better) and "she wasn't any worse than she was before" (the vital signs had not changed), "I elected again, in my medical judgment, to sit tight."

In the deposition Kovarik stated that he had not been given the vital signs by the nurse on any occasion, and that if he had he would have gone to the hospital immediately because the vital signs indicated a "serious condition." When asked how he reconciled his trial testimony with that given in his pretrial deposition, he said, "I can't."

As previously mentioned, Kovarik testified at trial that in the exercise of his professional judgment it was not necessary to see the patient. If Kovarik is bound by his admissions in the deposition, and the conflicting trial testimony of Kovarik is disregarded, then the testimony of all the experts is unanimous, i.e., given Kovarik's admitted knowledge of the patient's symptoms at 7:30 p.m., their serious nature, and his

admitted availability, proper care of the patient required him to go to the hospital, examine the patient, and attempt a diagnosis.

The question raised with reference to the effect of Kovarik's testimony in his deposition is whether, under the circumstances of this case, the admissions bind him or simply go to the issue of his credibility. Similar questions have been discussed many times before by this court and some distinctions have been made. In *Kirchner v. Gast*, 169 Neb. 404, 416, 100 N.W.2d 65, 74-75 (1959), we said: "Those cases where we have held the statements to be judicial admissions have been where it is patent that the witness deliberately changed his testimony to meet the necessities of the case, and where the change has been unexplained, or is unexplainable on any rational basis. We have then held it to be a matter of law, but otherwise it is a question of credibility for the trier of facts." The above rule has been reiterated many times, although not always applicable to the issue in the particular case in which the discussion took place. In *Sacca v. Marshall*, 180 Neb. 855, 868, 146 N.W.2d 375, 383 (1966), we said, in distinguishing other cases: "The foregoing cases adopted the rule that where a plaintiff, without reasonable explanation, testifies to facts materially different concerning a vital issue, the change clearly being made to meet the exigencies of the pending action, the evidence is discredited as a matter of law and should be disregarded." In *Insurance Co. of North America v. Omaha Paper Stock, Inc.*, 189 Neb. 232, 234-35, 202 N.W.2d 188, 190 (1972), we said: "In connection with the contradictory statements of witnesses, we call attention to Clark v. Smith, 181 Neb. 461, 149 N.W.2d 425, wherein it is held: 'Where a party without reasonable explanation testifies to facts materially different concerning a vital issue, the change clearly being made to meet the exigencies of pending litigation, such evidence is discredited as a matter of law and should be disregarded." See, also, *Beshaler v. Helberg*, 187 Neb. 584, 193 N.W.2d 261 (1971).

In *Nichols v. McArdle*, 170 Neb. 382, 102 N.W.2d 848 (1960), the defendant had testified in an earlier suit against him, arising out of the same automobile accident but involving a different plaintiff, that he had been rendered unconscious and did not know whether he had stopped at a traffic sign before entering the intersection. In the cited case he testified that he had brought his car to a halt at the stop sign before entering the intersection. We held as follows: "He offered no explanation of the contradictory and inconsistent testimony given by him in the two cases. The assertion made on the trial of this case by appellant that he stopped his automobile at the stop sign before he entered upon the highway is not, under the circumstances, available to him in this litigation. A litigant may not recite upon oath one statement of fact in one judicial proceeding and thereafter, to meet the exigencies of the case in the trial of a different cause, recite an entirely different and inconsistent story. In such a situation the evidence is discredited as a matter of law and will be disregarded." *Id.* at 395-96, 102 N.W.2d at 856.

It is argued by Kovarik the rule applies only where, in a later trial on the same set of facts, the witness changes his testimony to obviate objections pointed out on appeal. See *Peterson v. Omaha & C. B. Street R. Co.*, 134 Neb. 322, 278 N.W. 561 (1938), where we said: "Testimony of a witness [the plaintiff] on a vital point in a case, materially changed to obviate objections pointed out by this court on a former appeal, without any sufficient explanation given, is discredited as a matter of law, and will be disregarded." (Syllabus of the court.) That is one application of the rule, but as a matter of substance we see no difference whether the issue rises in a retrial of the same case or in the trial of a related case, as in *Nichols, supra.* Neither is its application limited to plaintiffs. See *Nichols, supra.* In principle, there is no difference between the use of deposition testimony in the same case and the use of testimony from a former

trial related to the same matter. The important considerations are that the testimony pertains to a vital point, that it is clearly apparent the party has made the change to meet the exigencies of the pending case, and that there is no rational or sufficient explanation for the change in testimony. The rule would not, for example, necessarily apply in an automobile case where a party in his deposition testifies to his estimate of certain distances and then before trial, after a visit to the scene and viewing landmarks, makes measurements and changes his estimates.

We now return to the issue of the directed verdict. The patient's symptoms, their seriousness, the doctor's knowledge thereof, and his opportunity to examine and diagnose are undisputed. Should the jury have been instructed that the defendant was negligent as a matter of law in not going to the hospital, making a personal examination of the patient, and making attempts at further diagnosis? We hold that such instructions should have been given. We have recently said: "A patient is entitled to an ordinarily careful and thorough examination such as the circumstances, the condition of the plaintiff, and the physician's opportunities for examination will permit, and, while he does not insure the correctness of his diagnosis, a physician or surgeon is required to use reasonable skill and care in determining through diagnosis the condition of the patient and the nature of the ailment, and is liable for a failure, due to want of the requisite skill or care to diagnose correctly the nature of the ailment, with resulting injury or detriment to the plaintiff." *Anderson v. Moore*, 202 Neb. 452, 464, 275 N.W.2d 842, 849 (1979). In *Revels v. Pohle*, 101 Ariz. 208, 211, 418 P.2d 364, 367 (1966), the Supreme Court of Arizona said: "'"The law thus requires a surgeon to possess the skill and learning which is possessed by the average member of the medical profession in good standing, and to apply that skill and learning with ordinary and reasonable care. *He is not liable for mere error of judgment provided he*

does what he thinks is best after a careful examination. * * *"' (Emphasis added.)

"The key words in the above quotation are 'provided' and 'after.' One does not have to be a doctor to know that due care was not exercised if a physician acts without giving a thorough and careful examination, such as the condition of the patient and attending circumstances will permit."

In *Katsetos v. Nolan*, 170 Conn. 637, 654, 368 A.2d 172, 182 (1976), the Supreme Court of Connecticut said: "We have not previously had occasion to consider the duty of a physician to remain in attendance upon a patient in critical condition. We now follow the general rule that in the absence of an emergency or special circumstances 'a physician is under the duty to give his patient all necessary and continued attention as long as the case requires it, and that he should not leave his patient at a critical stage without giving reasonable notice or making suitable arrangements for the attendance of another physician.'" See, also, *Thomas v. Corso*, 265 Md. 84, 288 A.2d 379 (1972).

The particular issue we are discussing did not, in the last four cited cases, arise in the context of whether a verdict should have been directed against the doctor. However, where the facts are not in dispute, then ordinarily the evidence should be taken as true. *Morris v. Equitable Life Assurance Society*, 109 Neb. 348, 191 N.W. 190 (1922).

In the case before us, there is no dispute about the central facts. Kovarik had knowledge of the patient's symptoms and their serious nature. He did not go to the hospital to make a personal examination and attempt further diagnosis. There was nothing to prevent him from so doing. He was negligent as a matter of law in these respects. The additional questions of negligence concerning failure to make a proper diagnosis, failure to consult a specialist, and proximate cause of the death of the patient are for the jury. The lower court did not err in granting the personal representative a new trial

as to Kovarik.

The appeal as to the defendant Nebraska Methodist Hospital may be dealt with rather summarily. The claims of negligence against it are primarily that it failed to procure another physician when Kovarik did not come to the hospital and that it failed to have a doctor available in the hospital to cover in such circumstances. We have read the record. These and other issues were jury questions and have been decided by the jury. No prejudicial error appears. The trial court was correct in not granting the motion for a new trial as to the hospital.

AFFIRMED.

KRIVOSHA, C.J., concurs in result.

PAUL DARR ET AL., APPELLEES, V.
C. CAROLL LONG, APPELLEE,
AETNA CASUALTY AND SURETY COMPANY,
GARNISHEE-APPELLANT.

313 N.W.2d 215

Filed December 4, 1981. No. 43524.

1. **Garnishment.** Garnishment in aid of execution of a judgment is proper in Nebraska only when the garnishee has property of and is indebted to the judgment debtor.
2. **Garnishment: Appeal and Error.** A garnishee who denies possession of property of or a debt owing to the debtor and asks to be discharged in garnishment has properly raised the issue of the applicability of garnishment as a remedy under the circumstances then existing.
3. **Garnishment.** A creditor plaintiff seeking recovery from a garnishee has no greater rights than those of the judgment debtor himself.
4. **Garnishment: Liability.** The test in determining liability of the garnishee defendant to the garnisheeing plaintiff is whether or not the facts would support a recovery by the principal defendant against the garnishee.
5. **Bonds: Principal and Surety.** A motor vehicle dealer's bond, furnished under the provisions of Neb. Rev. Stat. § 60-1419 (Reissue 1978), which creates a liability on the part of the surety to indemnify any person "by

reason of any loss suffered" requires proof of an actual loss suffered before recovery is permitted, and does not cover statutory penalties.

6. **Federal Acts: Courts.** In the administration and interpretation of federal legislative acts, pertinent opinions of the federal courts are binding upon the state courts.
7. **Federal Acts: Damages.** An award of damages against an auto dealer under the terms of 15 U.S.C. § 1989(a) (1976) is a penalty and a reward to the purchasers for bringing the action successfully, and is not limited or designed to compensate one for a loss suffered.

Appeal from the District Court for Douglas County: THEODORE L. RICHLING, Judge. Reversed and remanded with directions to dismiss the garnishment proceedings and discharge the garnishee.

John R. Douglas and Patrick B. Donahue of Cassem, Tierney, Adams, Gotch & Douglas for appellant.

Robert L. Freeman of White, Lipp, Simon & Powers for appellees Darr.

No appearance for appellee Long.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

HASTINGS, J.

This is an appeal from the entry of a decree in garnishment by the District Court for Douglas County in favor of the plaintiffs and against the Aetna Casualty and Surety Company in the amount of $40,000. This decree was based upon a judgment obtained by the plaintiffs in an action against C. Caroll Long, doing business as Caroll Long Auto Sales. The "funds" garnished were the face value of two $20,000 motor vehicle dealer's bonds issued by Aetna to C. Caroll Long in accordance with the statutory requirement that all applicants for motor vehicle dealer licenses furnish a surety bond to insure that the "applicant will faithfully perform all the terms . . . of said license, . . . that the licensed dealer will fully indemnify any person . . . by reason of any loss suffered because of . . . false and fraudulent representations or deceitful practices . . .

and . . . that the . . . dealer shall well, truly, and faithfully comply with all the provisions of his license and the acts of the Legislature . . . ." Neb. Rev. Stat. § 60-1419 (Reissue 1978). Aetna has assigned numerous errors on appeal, the two principal assignments being that the court erred in determining that garnishment was the proper remedy and that the bonds were available to pay statutory penal damages. We reverse and remand for the reasons set forth below.

This entire matter originated as a class action filed by plaintiffs against Long, alleging that plaintiffs and some 40 other citizens of Nebraska had purchased used automobiles from persons who had obtained them from Caroll Long Auto Sales on which the odometers had been turned back and the mileage certificates falsified. Such activities were alleged to be violations of 15 U.S.C. § 1984 (1976) and Neb. Rev. Stat. § 60-2303 (Reissue 1978). Section 1984 prohibits the alteration of the "odometer of any motor vehicle with intent to change the number of miles indicated thereon." Section 60-2303 requires any person transferring title to a motor vehicle in Nebraska to provide the buyer with a statement which in effect certifies that the mileage on the odometer is correct. A violator of the federal statute "shall be liable in an amount equal to the sum of (1) three times the amount of actual damages sustained or $1,500, whichever is the greater . . . ." 15 U.S.C. § 1989(a) (1976).

Aetna entered the lawsuit at this point by filing a petition in intervention. Plaintiffs then moved for a summary judgment and withdrew all claims against Aetna. At no time did plaintiffs offer any proof as to the actual damages suffered by themselves or by other members of the plaintiff class. It would appear that both the plaintiffs and the trial court relied primarily upon the damage provisions of § 1989 (a), for in sustaining the motion for summary judgment against Long, the trial court entered judgment in an amount "for each member of the Plaintiff Class, three (3) times the actual

damages suffered or Fifteen Hundred Dollars ($1,500.00) damages, whichever is the greater," to be determined "by this Court or by such referee as might be duly appointed for that purpose." No further proceedings have been had toward making that determination.

On the basis of that judgment the plaintiffs filed an affidavit in garnishment and served interrogatories upon Aetna. Aetna responded by denying that it had "property of" or owed any indebtedness "to the judgment debtor" (Long) which would be subject to garnishment under the provisions of Neb. Rev. Stat. § 25-1056 (Reissue 1979). Aetna further replied by supplemental answer that it had issued two motor vehicle dealer's bonds to Long in the face amount of $20,000 each, and prayed for an order discharging it as garnishee. At the request of the plaintiffs, a hearing was had to determine Aetna's liability as garnishee. Following this hearing the court noted the many violations of federal and state law committed by Long which amounted to breaches of the conditions of the bonds. Consequently, the court concluded that "[f]or each of these and other violations by Long of the terms and conditions of the bonds, they [the bonds] remain subject to forfeiture in their entirety without need of any further proof of damages or losses, actual or otherwise." The court then ordered the aggregate penal sum of the two bonds in the amount of $40,000 paid into court. Aetna then perfected this appeal.

At the outset, we should dispose of the plaintiffs' claim that Aetna did not raise the issue of the applicability of garnishment as a remedy in the court below and therefore is precluded from doing so here. This is not true. As previously indicated, in its answers to interrogatories it denied any indebtedness to or possession of any property of Long and asked that it be discharged in garnishment. This clearly raised that issue and preserved it for this appeal.

This brings us to the principal question of whether an

action in garnishment may be brought against the surety of a motor vehicle dealer's bond. Garnishment in aid of execution of a judgment is proper in Nebraska only when the garnishee has property of and is indebted to the judgment debtor. § 25-1056. The question becomes whether Aetna was indebted to or owned any property right of C. Caroll Long at the time the forfeiture of the bonds was ordered by the District Court.

Plaintiffs cite in support of their position that garnishment was proper *Townley v. Whetstone*, 190 Neb. 541, 209 N.W.2d 350 (1973), and *Morrill v. Gallagher*, 370 Mich. 578, 122 N.W.2d 687 (1963). However, both of those cases involved contracts of liability insurance, which is an altogether different matter. At least as early as 1917, Nebraska recognized the right of garnishment in cases involving liability insurance. In *Elliott v. Aetna Life Ins. Co.*, 100 Neb. 833, 161 N.W. 579 (1917), this court quoted with approval the following language from *Patterson v. Adan*, 119 Minn. 308, 138 N.W. 281 (1912): "'We therefore hold that, in a policy such as this, where the company has come into the litigation and assumed exclusive control thereof under its contract, it recognizes a liability, if it fails to defend successfully, to pay the assured the amount of the judgment it so permits to be established, not exceeding the sum stipulated in the policy, and also that, as to the plaintiff [judgment creditor], it should be considered that such judgment is a debt due the assured from the company, and not dependent on any contingency.'" *Id.* at 838, 161 N.W. at 581.

Plaintiffs also rely upon *Seider v. Roth*, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966). There, attachment of a liability insurance policy issued to the defendant Lemiux was utilized to obtain in rem service upon him, a Canadian resident. In allowing such a proceeding, the court said: "The Hartford policy is in customary form. It requires Hartford, among other things, to defend Lemiux in any automobile negligence action and, if judgment be rendered against Lemiux, to

indemnify him therefor. Thus, as soon as the accident occurred there was imposed on Hartford a contractual obligation which should be considered a 'debt' within the meaning of CPLR 5201 and 6202." *Id.* at 113, 216 N.E. 2d at 314, 269 N.Y.S. 2d at 101. This, it would seem, is simply an application of the general rule that a policy of liability insurance is garnishable although one of indemnity is not. 7A Am. Jur. 2d *Automobile Insurance* § 448 (1980).

The only other cases cited by plaintiffs in support of their position on this issue are *Savchuk v. Rush*, 311 Minn. 480, 272 N.W.2d 888 (1978), and *Fico, Inc. v. Ghingher*, 287 Md. 150, 411 A.2d 430 (1980). *Savchuk* involved garnishment of a liability insurance carrier and a statute which authorized garnishment where the garnishee and the debtor are parties to a contract of suretyship, guarantee, or insurance. *Fico* involved garnishment of a fund created under the Maryland Bulk Transfer Act and held in escrow for the benefit of creditors. However, it is interesting to note that the Maryland court repeated the language which has been applied universally in garnishment cases: "An attaching judgment creditor is subrogated to the rights of the judgment debtor and can recover only by the same right and to the same extent that the judgment debtor might recover." *Id.* at 159, 411 A.2d at 436.

We have held that a creditor plaintiff seeking recovery from a garnishee has no greater rights than those of the debtor himself. If the latter has a right of action in garnishment against the garnishee, so does the creditor, but not otherwise. *Fitzgerald v. Hollingsworth*, 14 Neb. 188, 15 N.W. 345 (1883). "[T]his plaintiff by garnishment could obtain no better right than her debtor had." *Farrington v. Fleming Commission Co.*, 94 Neb. 108, 112, 142 N.W. 297, 299 (1913).

In *Nite Owl Corp. v. Mgement Serv., Inc.*, 84 S.D. 521, 527, 173 N.W.2d 451, 454 (1970), that court stated: "This court has said that a proceeding in garnishment is in effect an action by a defendant debtor in the plaintiff-

creditor's name against the garnishee. . . . The test in determining liability of the garnishee defendant to the garnisheeing plaintiff is whether or not the facts would support a recovery by the principal defendant against the garnishee defendant."

The following cases are reflective of this debtor-creditor theory of garnishment. *Moe v. Conn*, 129 Wash. 380, 225 P. 69 (1924), involved a statutorily required bond to all damages which might be sustained by persons injured while riding in a jitney. In rejecting the propriety of a garnishment proceeding on such a bond, the court said, "[W]e are of the opinion that the bond in this case did not create such an indebtedness." *Id.* at 384, 225 P. at 71. *Seaboard Surety Co. v. Acme Wellpoint Corp.*, 156 So. 2d 688 (Fla. 1963), also denied the remedy of garnishment. That court said, "Under no consideration was Seaboard, the surety on Smith's bond, indebted to Smith, the principal, for an obligation which Smith itself was obligated to pay. The breach of a bond by a principal could create no liability against the surety by which the principal may profit." *Id.* at 689. Finally, *G'Year T. & R. Co. v. New Ams'Dam Cas. Co.*, 101 Ga. App. 577, 114 S.E.2d 546 (1960), involved a contractor's bond to materialmen and laborers. There it was stated: "If there is no debt owing by the garnishee to the principal debtor, there is no basis for a garnishment." *Id.* at 578, 114 S.E.2d at 547.

G'Year T. & R. Co. also ably distinguishes garnishment proceedings against a liability insurance carrier and a surety on a bond. In doing so, it found that the obligation of a surety bond "rendered the surety liable to the persons therein named in the event of the failure of the contractor to make the payments to such persons, but it did not create any liability, contingent or otherwise, as between the principal and the surety." *Id.* at 578, 114 S.E.2d at 547. In light of this finding, the court concluded: "The instrument which forms the basis for the proceeding of garnishment in this case is a joint and several obligation of the contractor and the surety. The

contractor, being an obligor thereon, acquired no rights thereunder. [Citations omitted.] This case is distinguishable from those cases involving liability insurance where the contract is between the insurer and the insured and where the obligation of the insurer is to pay upon the contingency named therein without regard to the ability of the insured to pay. In such cases, a right of action in favor of the insured arises against the insurance company." *Id.* at 578, 114 S.E.2d at 547.

A similar situation exists in the present action. The bonds issued by Aetna are conditioned upon the faithful performance by Long of all the terms and conditions of his license and the acts of the Legislature relating thereto. They further provide that the dealer will fully indemnify persons suffering a loss due to the dealer's false and fraudulent practices. Such language creates no liability of the surety to the principal and creates no right of action in the principal against the surety. By contrast, an insurance policy creates an obligation in the insurer toward the insured. As a general rule, a surety bond which runs in favor of the state or a third person creates no such liability to the principal and is not subject to garnishment by the principal's creditors. The District Court should have granted Aetna's request for discharge in garnishment.

There is an equally compelling reason why the judgment of the District Court must be reversed. This involves Aetna's second assignment of error which questions the availability of the bond proceeds to pay statutory penal damages.

This court has made it clear that the proceeds of motor vehicle dealer's bonds shall be made available to the customers of fraudulent auto dealers. In interpreting the predecessor of § 60-1419, we stated: "It is obvious that the Legislature intended that any person sustaining loss by reason of a motor vehicle dealer's conduct in engaging in acts prohibited by law would be entitled to recourse on such a bond . . . ." *Sun Ins. Co. v. Aetna Ins. Co.*, 169 Neb. 94, 110, 98 N.W.2d 692, 701

(1959). However, one may not be able to equate the word "loss" as used in *Sun Ins. Co.* with the recovery awarded the plaintiff class in the principal action in this case.

The award of damages entered by the District Court against Long provided "for each member of the Plaintiff Class, three (3) times the actual damages suffered or Fifteen Hundred Dollars ($1,500.00) damages, whichever is the greater." The similarity between the language of this award and the provision of § 1989(a) governing damages for violation of the federal Motor Vehicle Information and Cost Savings Act makes it obvious to this court that said award was based upon the federal damage provision and not upon actual damages suffered by the plaintiff class. This reliance on the federal act in awarding damages to the plaintiff class is an important factor in determining whether such an award is within the coverage of the bonds in question.

As stated above, the bonds are to insure that the auto dealer faithfully performs and complies with all the terms and conditions of his dealer's license as well as with the acts of the Legislature relating thereto. They are also meant to insure that the dealer will indemnify "any person or other dealer by reason of any loss suffered" due to "any false and fraudulent representations or deceitful practices whatever in representing any motor vehicle or trailer . . . ." The issue facing the court at this time is whether the damages awarded by the District Court amount to a "loss suffered" as that phrase is used in the bonds.

Numerous courts have determined that an award of damages pursuant to § 1989(a) is not meant to compensate for actual damages suffered but, rather, is designed to punish or deter fraudulent auto dealers and to reward customers of those dealers who have successfully brought suit for the fraudulent actions. *Klein v. Pincus*, 397 F. Supp. 847 (E.D.N.Y. 1975); *Kantorczyk v. New Stanton Auto Auction, Inc.*, 433 F. Supp. 889 (W.D. Pa. 1977); *Parker v. DeKalb Chrysler Plymouth,*

459 F. Supp. 184 (N.D. Ga. 1978); *Cantrell v. Thaler Ford Sales, Inc.*, 485 F. Supp. 528 (S.D. Ohio 1980); *Byrne v. Autohaus on Edens, Inc.*, 488 F. Supp. 276 (N.D. Ill. 1980); *Tye v. Spitzer-Dodge*, 499 F. Supp. 687 (S.D. Ohio 1980); *Shipe v. Mason*, 500 F. Supp. 243 (E.D. Tenn. 1978); *Christianson v. Lease Associates, Inc.*, 87 Wis. 2d 123, 273 N.W.2d 776 (1978).

Fischer v. Long and Aetna Casualty & Surety Co., CV79-L-108 (D. Neb. 1979), is indicative of this line of cases. That case involved the same bonds, principal, and surety as are involved in the present action. The Fischers were granted a default judgment against Long for $1,500 in accordance with § 1989(a) and then sought to obtain payment of that amount out of the funds secured by the bonds. In granting Aetna's motion to dismiss, the court noted that the purpose of § 1989(a) was to "punish odometer tamperers by imposing civil penalties upon them and to reward purchasers who discover such tampering and bring it to the attention of the federal courts. [Citations omitted.] Moreover, as common law remedies for victims of odometer tampering were available prior to the enactment of § 1989, it would appear that the purpose of the statute would not be compensation, but punishment." By drawing this conclusion, the court was able to find: "To state a cause of action against Aetna under the surety contract, the plaintiffs must allege that they have suffered a loss. This they have not done; they have only prayed for judgment in the amount of $1,500 pursuant to § 1989(a). This is insufficient, because the surety agreement does not cover indemnification for statutory penalty/reward."

While such federal decisions are not binding on this court with regard to the interpretation of the words "any loss suffered," as used in the bonds and § 60-1419, we are inclined to follow the ruling of the federal district court insofar as an intepretation of 15 U.S.C. § 1989(a) is concerned. This court has stated: "[W]e are obligated to examine any existing federal court cases because, in the administration and interpretation of

federal legislative acts, pertinent opinions of the federal courts are binding upon the state courts. [Citation omitted.]" *Anderson v. Wagner*, 207 Neb. 87, 91, 296 N.W.2d 455, 458 (1980).

In light of this rule, the court is obligated to follow the numerous cases interpreting § 1989(a) and conclude that an award under that provision is a penalty and a reward for bringing the action successfully, and is not limited or designed to compensate one for a "loss suffered." Therefore, the plaintiff class may only recover on the bonds in question by alleging and proving actual damages arising out of Long's fraudulent activities. This they have not done, as is evident by the fact that no action has been taken by the District Court or a referee appointed by that court to determine damages in accordance with the District Court's order of November 16, 1979. The plaintiff class may proceed against Aetna by direct action to recover only those actual damages which they have suffered to the extent that they have proven the same.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS THE GARNISHMENT PROCEEDINGS AND DISCHARGE THE GARNISHEE.

LINDA DAVIS, APPELLANT, V. TEXACO, INC., ET AL., APPELLEES.

313 N.W.2d 221

Filed December 4, 1981. No. 43546.

1. **Torts: Mental Distress: Damages.** Recovery for intentional infliction of mental distress will not lie unless the character of the defendant's action is outrageous and the emotional distress inflicted upon the plaintiff is severe.
2. ____: ____: ____. To be actionable the conduct must be so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and be regarded as atrocious and utterly intolerable in a civilized community.
3. ____: ____: ____. Liability does not extend to mere insults, indignities,

threats, annoyances, petty oppressions, or other trivialities.

4. ____: ____: ____. The mental distress for which recovery may be had must be so severe that no reasonable man could be expected to endure it.

Appeal from the District Court for Douglas County: KEITH HOWARD, Judge. Affirmed.

Ronald J. Palagi and J. Michael Moriarty for appellant.

Michael McGill and Allen E. Daubman of McGill, Koley, Parsonage & Lanphier, P.C., for appellee Texaco.

Robert D. Mullin, Jr., of Boland, Mullin & Walsh for appellee Fornstrom.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

BOSLAUGH, J.

This was an action against Texaco, Inc., and Tom Fornstrom to recover damages for personal injuries and intentional infliction of mental distress.

On June 15, 1977, the plaintiff, Linda Davis, stopped at the Texaco filling station in Omaha, Nebraska, operated by Fornstrom, because fluid was leaking from the engine compartment of her automobile. The attendant at the station raised the hood of the automobile and removed the radiator cap, which allowed the fluid to escape with great force from the radiator. Some of the fluid splashed onto the plaintiff, who was standing near the right front fender of the automobile, resulting in burns to her face, neck, and back.

The trial court did not submit the plaintiff's claim for damages resulting from intentional infliction of mental distress to the jury, but instructed the jury that the plaintiff might recover damages for mental distress proximately caused by the negligence of the defendants. The jury returned a verdict for the plaintiff in the amount of $500, and she has appealed. Her principal assignment of error is that the trial court erred in withdrawing her claim for mental distress from the jury.

The plaintiff's claim for intentional infliction of mental distress was based on what occurred after the radiator cap had been removed. After the radiator fluid had splashed onto the plaintiff, she ran a short distance until she ran into a parked car, and then fell to her knees on the drive of the station. The plaintiff's sister, who was with her, came to the plaintiff's aid by removing her shirt and partially removing her undergarments.

The plaintiff's sister requested a towel or covering of some kind for the plaintiff from the station attendants. The plaintiff and her sister testified that they had to request something to cover the plaintiff two or three times before a station employee provided them with a fender cover. The evidence is in conflict as to whether the attendants knew the plaintiff had been burned. The plaintiff and her sister then attempted to use the restroom of the station and found it locked. The sister got the key from the station attendants, and the plaintiff remained in the restroom while her sister went back to the car to find the plaintiff's purse. When the sister returned to the restroom, the plaintiff suggested they go to a hospital, so the two women reentered her car. The plaintiff and her sister attempted to start the car several times without success.

A station attendant told them that the car would not start until the fender cover was returned. After the fender cover was exchanged for an old Texaco shirt, the attendant replaced the coil wire, which he had removed from the engine to prevent them from starting the engine. After the coil wire had been replaced, the engine started and the women proceeded to a hospital, where the plaintiff received emergency treatment.

Recovery for intentional infliction of mental distress will not lie unless the character of the defendant's action is outrageous and the emotional distress inflicted upon the plaintiff is severe. In *Paasch v. Brown*, 193 Neb. 368, 370, 227 N.W.2d 402, 404 (1975), this court, citing Restatement (Second) of Torts § 46 (1965), stated:

"'(1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.'" The *Paasch* opinion also noted: "Liability has been found only where the conduct has been so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community." *Id.* at 370, 227 N.W.2d at 404.

Comment (d) to § 46 of the Restatement states in part at 73: "The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. . . . There is no occasion for the law to intervene in every case where some one's feelings are hurt."

Meyer v. Nottger, 241 N.W.2d 911 (Iowa 1976), states that the conduct necessary to support such a claim "exceeds that which a reasonable person could be expected to endure." *Id.* at 918.

Furthermore, the emotional distress suffered by the plaintiff must be severe. According to the Restatement, "The law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it. The intensity and the duration of the distress are factors to be considered in determining its severity." Restatement, *supra*, Comment (j) at 77-78. See, also, *Vicnire v. Ford Motor Credit Co.*, 401 A.2d 148 (Me. 1979). *Anderson v. Continental Ins. Co.*, 85 Wis. 2d 675, 695, 271 N.W.2d 368, 378 (1978), states that proof of an "extreme disabling emotional response" is required. Both extreme and outrageous conduct and extreme emotional distress must be proved to support the claim. *Vicnire v. Ford Motor Credit Co.*, *supra*; *Meyer v. Nottger*, *supra*.

The plaintiff makes no claim for emotional distress on any day other than the day on which the incident occurred. She relies upon the perceived unresponsiveness of the station attendants to her requests for a cover-

ing and the action of the attendant in disabling her car so that she could not leave the station without returning the fender cover. The record shows the plaintiff and her sister were detained by the removal of the coil wire for only a relatively brief period of time; the attendant did exchange the fender cover for another type of covering for the plaintiff; and he immediately replaced the coil wire after this exchange.

We are of the opinion that the conduct of the station attendants did not rise to the level of the extreme and outrageous conduct which is essential for conduct to be actionable for intentional infliction of emotional distress.

Although the plaintiff did suffer some embarrassment and humiliation as a result of the incident, there is no evidence of extreme mental distress in this case.

The plaintiff also contends that the instruction which allowed the plaintiff to recover damages for mental distress proximately caused by the negligence of the defendants was misleading and confusing. We have examined the instruction and have concluded that it was not erroneous when considered together with the other instructions to the jury.

The judgment of the District Court is therefore affirmed.

AFFIRMED.

WHITE, J., concurring.

I agree with the conclusion reached by the majority. The evidence indicates that the emotional distress inflicted upon the plaintiff in this unfortunate situation was not shown to be severe, and that absent such proof the plaintiff cannot recover.

The majority opinion is unclear as to whether or not it would find that there was sufficient evidence for a jury to find that the conduct was outrageous. I believe it was outrageous.

The evidence shows that a woman was burned by the negligent acts of a Texaco station employee. She was

compelled to remove her outer garments which were saturated with hot radiator fluid. She requested something to cover herself and was given a filthy fender skirt to cover her partial nakedness. While attempting to leave the premises to secure medical treatment while naturally upset, hysterical, and in pain, the woman found that a station attendant had removed the ignition coil from her automobile and he would not restore it unless she surrendered the fender cover, thus leaving her partially clad on a major thoroughfare in Omaha, Nebraska. Finally, she suffered the indignity of being forced to bargain for a used shirt. This conduct cannot be characterized as anything less than outrageous under any standard of civilized human behavior. The conduct was inexcusable, brutal, indifferent, and uncaring.

KRIVOSHA, C.J., joins in this concurrence.

TREPTOW CO., A NEBRASKA CORPORATION, APPELLANT AND CROSS-APPELLEE, V. DUNCAN AVIATION, INC., ET AL., APPELLEES AND CROSS-APPELLANTS, NBC LEASING CO., APPELLEE.

313 N.W.2d 224

Filed December 4, 1981. Nos. 43559, 43672.

1. **Conspiracy.** A civil conspiracy is a combination of two or more persons to accomplish by concerted action an unlawful or oppressive object, or a lawful object by unlawful or oppressive means.
2. _____. An action of conspiracy sounds essentially in tort. The principal element of conspiracy is an agreement or understanding between two or more persons to inflict a wrong against or injury upon another. It involves some mutual mental action coupled with an intent to commit the act which results in injury. Without the scienter, persons cannot conspire.
3. **Uniform Commercial Code: Repossessed Collateral.** A transfer of repossessed collateral to a seller by a finance company pursuant to a guaranty is not a sale or disposition of the collateral.
4. **Conspiracy.** The gist of an action for civil conspiracy is not the con-

spiracy charged but the damages the plaintiff claims to have suffered because of the wrongful acts of the defendants. If damages are shown to have resulted from the wrongful act of one or more of the defendants, then the plaintiff may recover against such defendants even though there is no proof of a conspiracy.

5. **Prejudgment Interest.** Where the damages are not liquidated and the evidence does not furnish data which, if believed, would make it possible to compute the damages with exactness, a plaintiff is not entitled to prejudgment interest.

Appeal from the District Court for Lancaster County: HERBERT A. RONIN, Judge. Affirmed.

Patrick H. McDonnell for appellant.

Ginsburg, Rosenberg, Ginsburg, Cathcart, Curry & Gordon for appellees Duncan Aviation et al.

Knudsen, Berkheimer, Beam, Richardson & Endacott for appellee NBC Leasing.

Heard before BOSLAUGH, CLINTON, BRODKEY, and WHITE, JJ., and HOWARD, District Judge.

BOSLAUGH, J.

These appeals, which have been consolidated, arise out of a controversy concerning the sale of a Beechcraft Baron airplane. On April 26, 1974, the plaintiff, Treptow Co., entered into an equipment acquisition agreement with the defendant NBC Leasing Co., which was in substance a lease-purchase agreement. The agreement provided for monthly payments of $2,040 over a 6-year period with an option to the lessee-purchaser to purchase the airplane by payment of the "principal balance" due as shown on an amortization schedule.

The airplane was sold by the defendant Duncan Aviation, Inc., but since the sale was financed through the lease-purchase method, the title to the airplane was conveyed to the leasing company. The plaintiff purchaser's credit was not adequate to satisfy the leasing company, so it obtained a recourse agreement from the seller. The recourse agreement was a guarantee by the

seller of the payments due from the plaintiff under the equipment acquisition agreement and gave the seller the "right to exercise Lessee's purchase option."

On November 25, 1975, after numerous defaults by the purchaser, the leasing company notified the purchaser by mail that it had repossessed the airplane and would dispose of it at its "offices" after December 2, 1975. The leasing company then made demand on the seller on the recourse agreement. The seller paid the amount due, $90,637.44, to the leasing company on December 5, 1975, and took a bill of sale to the airplane.

The defendants Harry O. Barr and J. Robert Duncan are officers and employees of the seller. Harold Treptow, the president of the plaintiff, had a conversation with Barr on December 8, 1975, concerning the airplane. Although the evidence is in conflict, Treptow testified that the plaintiff was given until May 5, 1976, to reimburse the seller for the amount plus interest it had paid to the leasing company. During this time the seller would use the airplane in its charter operations for which the plaintiff would be reimbursed. The seller would pay for the insurance on the airplane and the plaintiff would pay for its maintenance.

In March 1976 the seller sold the airplane in Canada for $110,000 without any further notice to the plaintiff. Between December 8, 1975, and March 1976, the airplane had been flown in charter use approximately 70 hours and the plaintiff had been charged $1,900 for maintenance. The plaintiff produced evidence that the airplane had a value of $140,000 to $144,000 at the time it was sold.

This action was commenced on February 17, 1977. The second amended petition, which the plaintiff denominated as one for "civil conspiracy," alleged that the sale of the airplane in March 1976 without notice to the plaintiff violated Neb. U.C.C. § 9-504 (Reissue 1971); that the value of the airplane was $140,000 and the sale was not commercially reasonable; that the defendants had attempted to deprive the plaintiff of its

right of redemption under the Uniform Commercial Code; and that the plaintiff had been damaged by loss of the use of the property in charter operations. The plaintiff sought to recover damages in the amount of $150,000.

At the close of the plaintiff's evidence the trial court found as a matter of law there was no evidence of a civil conspiracy and dismissed the petition as against the leasing company. The trial court overruled the motions to dismiss made by the other defendants and the trial proceeded as to them.

The jury returned a verdict in favor of the plaintiff and against the defendants in the amount of $29,410.88. All of the parties filed motions for a new trial, which were overruled. They then filed notices of appeal.

The plaintiff contends the trial court erred in dismissing the petition as against the leasing company and in finding there was no evidence of a civil conspiracy.

There was no evidence in this case of concerted action to accomplish an unlawful or oppressive object, or a lawful object by unlawful or oppressive means. See *Dixon v. Reconciliation, Inc.*, 206 Neb. 45, 291 N.W.2d 230 (1980).

Although the leasing company and the seller both took action which might result in the plaintiff's loss of its right of redemption, the plaintiff was in default under the acquisition agreement and the defendants were entitled to protect their rights and avoid a loss caused by the plaintiff's default.

The recourse agreement was not illegal and did not prejudice the plaintiff's rights in the airplane. The plaintiff was not a party to the recourse agreement, and after the seller reimbursed the leasing company and took a bill of sale to the airplane, the plaintiff's rights were the same as if no transfer had occurred.

In *Reeves v. Associates Financial Services Co., Inc.*, 197 Neb. 107, 247 N.W.2d 434 (1976), we noted that a transfer of repossessed collateral to a seller by a finance company pursuant to a guaranty is not a sale or dis-

position of the collateral. In the *Reeves* case we said at 115, 247 N.W.2d at 439: "Section 9-504(5), U.C.C., qualifies the characterization of certain transfers of repossessed collateral, providing: 'A person who is liable to a secured party under a guaranty, indorsement, repurchase agreement or the like and who receives a transfer of collateral from the secured party or is subrogated to his rights has thereafter the rights and duties of the secured party. Such a transfer of collateral is not a sale or disposition of the collateral under this article.' This subsection clarifies who has the rights and duties of a secured party when a seller and a finance company have a guaranty or repurchase agreement on a contract which has been assigned to the finance company."

The order dismissing the petition as to the defendant NBC Leasing Co. was not erroneous.

The defendants Duncan Aviation Inc., Harry O. Barr, and J. Robert Duncan contend the trial court erred in failing to sustain their motions to dismiss and in allowing the trial to proceed against them after the trial court had determined there was no evidence of a conspiracy.

The gist of an action for civil conspiracy is not the conspiracy charged but the damages the plaintiff claims to have suffered because of the wrongful acts of the defendants. If damages are shown to have resulted from the wrongful act of one or more of the defendants, then the plaintiff may recover against such defendants even though there is no proof of a conspiracy. The rule was stated in *Trebelhorn v. Bartlett*, 154 Neb. 113, 116-17, 47 N.W.2d 374, 378 (1951), as follows: "In an action for damages based upon a conspiracy to defraud, such as that at bar, the damages and not the unlawful confederation is the gist of the action, so that if damages are shown to have resulted to plaintiff from wrongful acts or misrepresentations of defendants or any of them, then a judgment against such defendants may be sustained without establishing a conspiracy among

them all. Dunbier v. Mengedoht, 119 Neb. 706, 230 N.W. 669; Harvey v. Harvey, 75 Neb. 557, 106 N.W. 660; Commercial Union Assurance Co. v. Shoemaker, 63 Neb. 173, 88 N.W. 156; Booker v. Puyear, 27 Neb. 346, 43 N.W. 133.

"As stated in Annotation, 152 A.L.R. 1147: 'It has been frequently pointed out that, speaking broadly, there is no such thing as a civil action for conspiracy, the action being for damages caused by acts committed pursuant to a formed conspiracy, rather than the conspiracy itself, so that, unless something is actually done by one or more of the conspirators which results in damage, no civil action will lie against anyone. See, for example, 11 Am Jur 577, Conspiracy, § 45. Thus, in most cases the gist of such an action is the wrongful conduct resulting in the plaintiff's damage, and proof of a conspiracy is of no consequence except as bearing upon the rules of evidence, * * * or to bring within the ambit of liability someone who may have conspired but who did not actively participate in the conduct itself. In such cases failure to prove an allegation of conspiracy does not affect the plaintiff's right to recover, there being sufficient independent grounds for recovery, although it limits those against whom recovery may be had to persons actively participating in the conduct complained of, and whose acts, as regards time, substance, and result, in fact united to produce the injury.'"

The defendants contend, however, that it was a violation of the pretrial order to permit the trial to proceed against them after it had been determined there had been a failure of proof of a conspiracy.

The original petition filed by the plaintiff included a second cause of action based on a theory of breach of contract. On July 15, 1977, the plaintiff was given leave to file a separate action within 10 days. An order entered on September 29, 1978, recited that it was stipulated by the *plaintiff* and *defendant NBC Leasing Company* that "plaintiff is proceeding on theory of

tortious civil conspiracy."

A pretrial conference was held on January 11, 1980. The pretrial order, filed April 30, 1980, listed, in addition to issues relating to the alleged conspiracy, the following separate controverted and unresolved issues remaining to be determined:

"j. Whether the written notice given to the plaintiff was reasonable.

"k. Whether there was a sale of the aircraft and, if so, whether such sale was commercially reasonable.

"l. The amount of the plaintiff's damages, if any."

At a conference in chambers at the beginning of the trial, the plaintiff stated that, in addition to the question as to whether a conspiracy existed, there would be a question as to whether the wrongful acts of individual defendants had injured the plaintiff. Mention was made of a second action then pending between the plaintiff and the defendant Duncan Aviation, Inc., which involved alleged violations of the Uniform Commercial Code and the same transaction. The plaintiff conceded that the result of the trial in this case would dispose of some of the issues in the second case. The defendants made no objection at that time.

When the motions to dismiss all of the defendants except the leasing company were overruled, the defendants did not claim surprise and there was no request for a continuance.

In view of the state of the record, we are unable to find that the trial court abused its discretion in ordering the trial to proceed as against all defendants except the leasing company.

Finally, the plaintiff contends it should have been allowed prejudgment interest. The plaintiff argues that surplus realized on the sale of collateral is a liquidated amount which entitles the plaintiff to prejudgment interest.

In this case the plaintiff did not proceed on the theory of an action to recover surplus realized on the sale of collateral. The plaintiff alleged it was damaged by

defendant's failure to notify it that the airplane would be sold and because the sale was not commercially reasonable. Here the damages were not liquidated and the evidence did not furnish data which, if believed, made it possible to compute the damages with exactness. The plaintiff was not entitled to prejudgment interest.

There being no error, the judgment of the District Court is affirmed.

AFFIRMED.

GEORGE E. HEYWOOD, SR., APPELLEE, V. CLARA M. HEYWOOD, APPELLANT.

313 N.W.2d 229

Filed December 4, 1981. No. 43599.

Equity: Appeal and Error. In equity cases, the Supreme Court reviews the record de novo and reaches an independent conclusion without reference to the findings of the trial court.

Appeal from the District Court for Douglas County: D. NICK CAPORALE, Judge. Reversed and remanded with directions.

Charles 1. Scudder for appellant.

Ronald H. Stave and Joseph S. Daly of Sodoro, Johnson, Daly, Stave, Cavel & Coffey for appellee.

Heard before BOSLAUGH, MCCOWN, CLINTON, and BRODKEY, JJ., and BLUE, District Judge.

BLUE, District Judge.

The respondent and the petitioner were married on September 24, 1941, and were separated in December 1976. In November 1977, while the respondent was hospitalized for a serious mental condition, the petitioner obtained her signature on a withdrawal slip to a joint savings account in the amount of $26,695.21. This ac-

count represented proceeds from the sale of their home. The petitioner used a part of these funds to purchase stock in a corporation named Hey-met, Inc., which corporation acquired a liquor license and a bar. The petitioner also made advances and loans to this corporation of which the petitioner and another man were the sole stockholders.

The petitioner filed a petition for dissolution of the marriage of the parties on June 12, 1978, without disclosing any details regarding the withdrawal of the funds of the parties. A decree of dissolution was entered on August 14, 1978, providing for alimony for respondent and a division of property. Respondent did not attend the hearing, nor was she represented.

After the respondent regained her health to a certain extent and became aware of what had taken place, she filed a petition on September 17, 1979, to modify the original decree, claiming fraud on the part of the petitioner. On October 23, 1979, after an evidentiary hearing, the trial judge found that the petitioner had falsely represented the nature and extent of the marital assets of the parties, and modified the original decree. The modified decree awarded the respondent $5,000, and in paragraph 2a. of the decretal portion of the order it provided as follows: "Respondent be, and she hereby is, awarded one-half of the stock owned by Petitioner in Hey-met, Inc. If said stock has been sold by Petitioner, he shall forthwith pay unto Respondent one-half of any and all profit he has realized on said sale. If said stock has been sold by Petitioner at a loss, Respondent shall pay unto Petitioner one-half of any and all such loss." This was a final order as defined by Neb. Rev. Stat. § 25-1902 (Reissue 1979) and was never appealed.

The respondent subsequently discovered that the petitioner had sold the bar. She then, on January 11, 1980, filed an application which in effect asked for an accounting, and for the petitioner to substantiate what was due and owing to the respondent. A hearing was held on this application and evidence was presented

which showed that, although the shares of stock of Hey-met, Inc., were never sold, the only asset of the corporation, which was the bar, was sold on November 1, 1979. The testimony is that the petitioner suffered a loss of $9,562 when the bar was sold. After this hearing the judge entered an order on June 9, 1980, as follows:

"Upon consideration whereof, the court now finds generally for the Petitioner and finds that the Petitioner suffered a loss of nine thousand five hundred sixty-two dollars ($9,562.00) from the sale of the stock which he owned in Hey-met, Inc.

"IT IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT the parties conduct themselves in accordance with the aforesaid finding in the performance of their respective rights and obligations pursuant to the terms of the Decree entered by this court on October 23, 1979."

The respondent filed a motion for a new trial, which was overruled. This appeal followed. The petitioner contends that the respondent, pursuant to the orders of the trial judge, is required to pay the petitioner one-half of his loss of $9,562 from the sale of the bar. This is manifestly unjust and a result which is not required under the facts of this case.

Paragraph 2a. of the decree of October 23, 1979, awarded to the respondent one-half of the stock. If the stock had been sold, it required the petitioner to pay to the respondent one-half of the profits from the sale of the stock, or if there was a loss, this paragraph required the respondent to pay petitioner one-half of such loss, but only if the stock had been sold prior to the date of the decree, which is October 23, 1979.

The evidence is that the stock had never been sold, and in fact the bar, the only asset of the corporation, had not been sold until November 1, 1979, after the date of the decree. Therefore, the only portion of paragraph 2a. of the decree of October 23, 1979, that is applicable is that portion which awards the respondent one-half of the stock owned by the petitioner in Hey-met, Inc.

We review this matter de novo on the record, and reach an independent conclusion on such record without reference to the findings of the District Court. *Kullbom v. Kullbom*, 209 Neb. 145, 306 N.W.2d 844 (1981); *Mid-States Equipment Co. v. Poehling*, 204 Neb. 791, 285 N.W.2d 689 (1979). Having this rule in mind, we find that the trial judge's finding in the order of June 9, 1980, to the effect that the petitioner suffered a loss of $9,562 from the sale of the stock which he owned in Hey-met, Inc., is erroneous and should be modified. The order as modified shall provide that the sale of the stock had not taken place, nor had the sale of the assets of the corporation of Hey-met, Inc., taken place at the time of the decree of October 23, 1979, and, therefore, under said decree of October 23, 1979, the respondent became the owner of her one-half of the stock of Hey-met, Inc., and could not be liable to the petitioner for any loss incurred in the sale of the assets of said corporation.

This matter is reversed and remanded with directions to modify the order of June 9, 1980, in conformity with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

DAVID L. WROBLEWSKI, APPELLEE, V. R. JAMES PEARSON, DIRECTOR OF THE DEPARTMENT OF MOTOR VEHICLES, HIS SUCCESSORS AND REPRESENTATIVES, AND THE STATE OF NEBRASKA, APPELLANTS.

313 N.W.2d 231

Filed December 4, 1981. No. 43603.

1. **Administrative Orders: Appeal and Error: Proof.** On appeal to the District Court from an order of the director of the Department of Motor Vehicles revoking a motor vehicle operator's license, the burden of proof is on the licensee to establish the invalidity of the order.
2. **Administrative Orders: Appeal and Error.** Upon a petition for review

of an order of suspension of an operator's license by the director of the Department of Motor Vehicles, the District Court is required to consider the record made before the director.

3. ____: ____. Liability resulting from an automobile accident ultimately depends upon a resolution of many issues, including the credibility of witnesses and a comparison of the negligence, if any, of the parties involved in the accident. These are not issues to be decided upon a petition to review an order of the Director of Motor Vehicles. An order of suspension should not be set aside unless there is no reasonable possibility of a judgment being rendered against the operator in question.

Appeal from the District Court for Valley County: JAMES R. KELLY, Judge. Reversed and remanded with directions.

Paul L. Douglas, Attorney General, and Linda A. Akers for appellants.

No appearance for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and HASTINGS, JJ.

KRIVOSHA, C.J.

The director of the Department of Motor Vehicles has appealed from an order of the District Court for Valley County, Nebraska, vacating a previous order entered by the director of the Department of Motor Vehicles suspending the motor vehicle operator's license of the appellee, David L. Wroblewski, for failure to comply with the requirements of Neb. Rev. Stat. § 60-507 (Reissue 1978) of the Motor Vehicle Safety Responsibility Act. Our examination of the record, viewed in light of our earlier decisions, leaves us with no alternative but to reverse the action of the District Court and reinstate the order of the Director of Motor Vehicles.

Wroblewski was involved in an accident on August 14, 1977, at 9:45 p.m., at a location approximately one-half mile west of Arcadia, Nebraska, on Highway 70. The three vehicles involved in the accident were following each other westbound on Highway 70.

According to the accident report submitted to the

Department of Motor Vehicles by Deputy Sheriff Eugene Vodehial, Wroblewski was the third car in this line of vehicles. The report indicates that Wroblewski attempted to pass the second vehicle but cut back in line too quickly, striking the second vehicle and forcing it off the road into a ditch. The report continues, that after striking vehicle No. 2, Wroblewski lost control of his car and hit the rear end of the first vehicle, knocking off its rear bumper. The Wroblewski vehicle then veered into the north ditch before coming to a stop.

A security deposit in the amount of $30,750 was fixed by the Department of Motor Vehicles. This amount was determined in accordance with the provisions of Neb. Rev. Stat. §§ 60-509 and 60-513 (Reissue 1978). Wroblewski did not have liability insurance before the accident and failed to post the bond as required by law. Accordingly, the department suspended Wroblewski's license and operating privileges.

Upon appeal to the District Court, pursuant to Neb. Rev. Stat. § 60-503 (Reissue 1978), the trial court determined that the burden was upon the Department of Motor Vehicles to prove the validity of its order. The trial court further held that while the accident report considered by the Director of Motor Vehicles was not admissible, the court would nevertheless consider it. In doing so the trial court said: "Of course the statute says that the accident report is not admissible, however, I am going to receive that, because we don't have a jury here; the analysis report I am going to strike from this, I am not going to admit that; I think that is too much hearsay and I will return it to you Miss and the remainer [sic] of Exhibit No. 1 will be received."

After hearing, the trial court found that there was no possibility of a judgment being rendered against Wroblewski and reversed the order of the director revoking Wroblewski's operator's license.

The department has appealed, maintaining that the trial court erred in not placing the burden of proof upon the licensee to establish the invalidity of the order

entered by the Department of Motor Vehicles. Further, the department maintains the trial court erred in not considering the entire record made before the director, and further erred in determining that there was not a reasonable possibility of a judgment being entered against the licensee as a result of the automobile accident.

In the cases of *Hehn v. State*, 206 Neb. 34, 290 N.W.2d 813 (1980), and *Berg v. Pearson*, 199 Neb. 390, 259 N.W.2d 275 (1977), similar questions were presented to this court. In *Hehn, supra*, we held: "On appeal to the District Court from an order of the director of the Department of Motor Vehicles revoking a motor vehicle operator's license, the burden of proof is on the licensee to establish the invalidity of the order." (Syllabus of the court.) Furthermore, in *Hehn, supra*, we held: "Upon a petition for review of an order of suspension of an operator's license by the director of the Department of Motor Vehicles, the District Court is *required* to consider the record made before the director." (Emphasis supplied.) (Syllabus of the court.) In so holding we said at 36, 290 N.W.2d at 814-15: "It is elementary that, if the District Court is to determine whether the director's action was correct and if the director is required by statute to consider all such reports and information filed in connection with the accident, then the record made before the director must be available to the District Court. To hold otherwise would render farcical the remedy of § 60-503. We would, in effect, be requiring the court to review a record without permitting that record to be admitted into evidence. It would be fruitless to discuss the ramifications of the suggestion that the report before the Department of Motor Vehicles constituted hearsay or for what purpose it was offered in evidence. The fact is that the record made before the director is admissible as evidence in the District Court because the statute plainly suggests that it is admissible."

The issue in cases of this nature is not whether a

judgment should be entered against the licensee but, rather, whether there is "a reasonable possibility" of a judgment being rendered against the licensee as a result of the accident. See § 60-507; *Schetzer v. Sullivan*, 193 Neb. 841, 229 N.W.2d 550 (1975). As we noted in *Berg, supra* at 392, 259 N.W.2d at 276-77: "Liability resulting from an automobile accident ultimately depends upon a resolution of many issues including the credibility of witnesses and a comparison of the negligence, if any, of the parties involved in the accident. These are not issues to be decided upon a petition to review an order of the Director. An order of suspension should not be set aside unless there is *no* reasonable possibility of a judgment being rendered against the operator in question." (Emphasis supplied.) The issue in cases of this nature is not whether the driver is actually liable in the accident; instead, the issue is only whether the evidence before the Department of Motor Vehicles supports its finding that there is a reasonable possibility of a judgment. The scope of review in cases of this nature is a review of the department's determination that there is a reasonable possibility of a judgment rather than an unlimited new trial on the issue of liability. See, *Jennings v. Mahoney*, 26 Utah 2d 128, 485 P.2d 1404 (1971), *aff'd* 404 U.S. 25, 92 S. Ct. 180, 30 L. Ed. 2d 146.

One cannot say as a matter of law that reasonable minds could not find that Wroblewski negligently operated his vehicle. There is at least a reasonable "possibility" that a judgment might be entered against Wroblewski. That is all the director is required to determine before imposing the requirements of the Nebraska Motor Vehicle Safety Responsibility Act. One may avoid the imposition of this act by procuring liability insurance in advance of an accident. By failing to do so, a driver subjects himself to the requirements of the act.

The record presented to the Director of Motor Vehicles, and thereafter presented to the District Court

for review, establishes that there is a reasonable possibility of a judgment being rendered against Wroblewski, though, admittedly, a trial on the merits might result otherwise. The judgment vacating the order of the director was erroneous and must be reversed. The judgment is therefore reversed and the cause remanded with directions to reinstate the order of the director.

REVERSED AND REMANDED WITH DIRECTIONS.

WHITE, J., participating on briefs.

STEVE LUDWIG, APPELLANT, V.
DAVID F. MATTER ET AL., APPELLEES.

313 N.W.2d 234

Filed December 4, 1981. No. 43639.

1. **Property: Deeds: Vendor and Vendee.** Generally, upon the execution, delivery, and acceptance of an unambiguous deed, such being the final acts of the parties expressing the terms of their agreement with reference to the subject matter, all prior negotiations and agreements are deemed merged therein, in the absence of a preponderance of evidence clear and convincing in character establishing some recognized exception such as fraud or mistake of fact, and the deed will be held to truly express the intentions of the parties.
2. **Summary Judgments.** When the allegations of the pleadings have been pierced by the movant, and the resistance to the motion fails to show that a genuine issue of fact exists, a summary judgment will be granted.

Appeal from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Richard L. Kuhlman for appellant.

Donald D. Schneider and Ray C. Simmons, P.C., for appellees Matter.

Daniel A. Martin of Kerrigan, Line & Martin for appellee Equitable Federal Savings & Loan.

Heard before KRIVOSHA, C.J., WHITE, and HASTINGS, JJ., and GITNICK, District Judge, and COLWELL, Retired District Judge.

COLWELL, Retired District Judge.

This equity case was brought by Steve Ludwig, plaintiff (vendee), against David F. Matter and Gwenith Matter, defendants (vendors), for equitable relief, reformation of deed to include more land, and for damages from Equitable Federal Savings and Loan Association of Fremont, defendant, for negligence. Vendors joined their realtor agent, Don Peterson & Associates Real Estate Co., as third party defendant.

Issues were joined, and all parties filed their several motions for summary judgment. Hearing was first had on the motions of vendee, vendors, and Peterson. Vendee's motion was denied. Summary judgments were entered in favor of vendors and Peterson. Thereafter, Equitable's motion was heard and summary judgment entered in its favor. Vendee appeals, assigning as error the granting of the three summary judgments.

In September 1977 vendors listed for sale with Peterson a tract of land on the edge of Fremont, Nebraska; the price was $90,000. Peterson obtained from a local abstracter a hand-drawn plat and description of the listing, reciting, "Pt of the NW^4 of the NE^4 of Sec 21-17-9 D/C N descr as follows: Beg at the NW cor thereof; thence East 285 ft; thence South 493 ft, thence West 285 ft; thence North 493 ft to the p.o.b." The plat indicated that the described tract was a combination of three adjacent tracts, making one rectangular tract that was 285 feet east and west and 493 feet north and south. Later, vendee contacted Charles Strasburg, a salesman for Peterson, to buy a small acreage. After negotiation, vendors agreed to sell off some land on the west side of the listing, including a house and barn, with the east side of an existing driveway to be the east line. No survey was made.

At the site, Strasburg pointed out to vendee the tract

to be sold and directed vendee's attention to a fence on the west side as the west boundary, and to a post in the fence as the northwest corner of the tract, and to the east side of a driveway as the east boundary. No lineal measurements were discussed. Strasburg may have shown the plat to vendee. A sale for $48,000 was agreed upon.

Peterson's office prepared a purchase agreement which was signed by vendors and vendee, describing the land as "Part of the NW¼ of the NE¼ of Sec 21-17-9 Dodge Co. Nebr. *Beginning at the NW corner thereof thence east 173 ft thence south 493' thence west 173' thence N. 493' to the point of beginning.*" (Emphasis supplied.)

Vendee obtained a loan from Equitable; he did not see or examine the abstract of title. Peterson prepared the deed of conveyance. The sale was concluded and the deed recorded on November 2, 1977, describing the land conveyed as "Tax Lots 1 and 4, in Section 21, Township 17 North, Range 9 East, of the 6th P.M., Dodge County, Nebraska, along with a road easement over the east 20 feet of tax lot 1 to the grantors and their heirs and assignes [sic]." A description of tax lots 1 and 4 does not appear in the record. Vendee assumed that the land shown to him was the same as described in the purchase agreement and in the deed, and that its north frontage was 173 feet east and west. Vendors did not know the measurement. In May 1978 vendee discovered that the northwest corner of the tract began at a point 33 feet east of the northwest corner of the northwest quarter of the northeast quarter of Section 21, Township 17 North, Range 9 West of the 6th P.M., Dodge County, Nebraska, and that the east-west lineal measurement was 140 feet instead of 173 feet. This suit follows.

We first consider the motions of vendors and Peterson. Vendee's petition alleges mutual mistake and that those defendants knowingly and recklessly made false statements to vendee concerning the description of the land. At the hearing, all of those interested parties offered evidence, including the affidavit of vendee,

affidavit of David F. Matter, and the deposition of Charles Strasburg. The abstract of title is not a part of the evidence.

Vendors and Peterson urge as a defense the doctrine of merger. The applicable rule is, "'Generally, upon the execution, delivery, and acceptance of an *unambiguous* deed, such being the final acts of the parties expressing the terms of their agreement with reference to the subject matter, all prior negotiations and agreements are deemed merged therein, in the absence of a preponderance of evidence clear and convincing in character establishing some recognized exception such as *fraud* or *mistake of fact*, and the deed will be held to truly express the intentions of the parties.'" (Emphasis supplied.) *Beren Corp. v. Spader*, 198 Neb. 677, 693, 255 N.W.2d 247, 256 (1977).

"'* * * the issue to be tried on a motion for summary judgment is whether or not there is a genuine issue as to any material fact, and not how that issue should be determined. In considering such a motion... the court should take that view of the evidence most favorable to the party against whom it is directed, giving to that party the benefit of all favorable inferences that may reasonably be drawn from the evidence.'" *Illian v. McManaman*, 156 Neb. 12, 18, 54 N.W.2d 244, 248 (1952).

An action in equity vests the trial court with broad powers authorizing any judgment under the pleadings. See *Lippire v. Eckel*, 178 Neb. 643, 134 N.W.2d 802 (1965).

From the record, there are genuine issues of material fact as to mutual mistake, location of land monuments, description of the land purchased and conveyed, and the broad issue of false representations which should not be determined upon affidavits. The summary judgments entered in favor of the vendors and Peterson should be set aside and trial had on the merits of the issues between those parties.

Concerning Equitable's motion for summary judg-

ment, vendee's petition alleges that he relied on the title examination made by Equitable's attorney and that Equitable negligently failed to notify vendee of the discrepancy in the legal description. No duty on the part of Equitable is alleged.

At the hearing, Equitable's evidence included the affidavits of vendee and David W. Matter and the deposition of Strasburg. Vendee offered no controverting evidence. Other facts shown by the record are that vendee made an application to Equitable for a mortgage loan and furnished it with a copy of the purchase agreement. Equitable prepared and vendee signed a "Good Faith Estimate of Settlement Charges," showing the amount of the loan, description and amount of settlement charges, including a charge of $40 for title examination, net proceeds of the loan, and an explanation for the title examination charge: "The provider of this service designated by this lender is the law firm of Kerrigan, Line, Martin and Hanson, Attorneys .... *This provider checks evidence of title presented at the fee designated* ...." (Emphasis supplied.) There is no record of a title opinion. The net loan proceeds were paid to vendee.

"'In order to constitute actionable negligence, there must exist three essential elements, namely, a duty or obligation which the defendant is under to protect the plaintiff from injury; a failure to discharge that duty; and injury resulting from the failure.'" *Ring v. Kruse*, 158 Neb. 1, 6, 62 N.W.2d 279, 284 (1954).

"[W]hen the allegations of the pleadings *have been pierced by the movant*, and the resistance to the motion *fails to show* that a genuine issue of fact exists, a summary judgment will be granted." *Prairie View Tel. Co. v. County of Cherry*, 179 Neb. 382, 385, 138 N.W.2d 468, 471 (1965).

Vendee's affidavit makes no reference to his relationship or contact with Equitable in support of his pleadings, and there is no other factual support in the record other than the settlement sheet. Equitable's record

pierced vendee's pleadings, showing it had no duty to vendee and that it was without fault. Vendee having failed to respond to that record, summary judgment was proper.

Without deciding the relationship between vendee and Equitable, we conclude that there was no genuine issue of material fact concerning vendee's cause of action against Equitable, and the summary judgment in favor of Equitable should be affirmed.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLANT, V. JIMMY L. PARMER, APPELLEE.

313 N.W.2d 237

Filed December 4, 1981. No. 43956.

1. **Statutes.** A statute is not to be read as if open to construction as a matter of course. Where the words of the statute are plain, direct, and unambiguous, no interpretation is needed to ascertain the meaning. In the absence of anything to indicate the contrary, words must be given their ordinary meaning. It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language. Neither is it within the province of the court to read anything plain, direct, and unambiguous out of a statute.
2. **Criminal Law: Statutes.** A penal statute is required to be strictly construed and should be given a sensible construction.
3. **Statutes.** A statute should be construed in the context of the object sought to be accomplished, the evils and mischiefs that are sought to be remedied, and the purpose for which it serves.
4. **Statutes: Legislative Intent.** When the language used in the statute is ambiguous and it becomes necessary to construe it, the principal objective is to determine the intent of the Legislature and to give it effect.
5. ____: ____. A legislative intention is to be determined from the statute taken as a whole, and the courts may properly consider the history of its passage.

Appeal from the District Court for Sheridan County: PAUL D. EMPSON, Judge. Reversed.

Dennis D. King and Terrance O. Waite of the Office of Sheridan County Attorney for appellant.

Michael T. Varn for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

WHITE, J.

This is an appeal by the State of Nebraska from a District Court order dismissing an information charging the defendant, Jimmy L. Parmer, with a violation of Neb. Rev. Stat. § 28-805(1)(a) (Reissue 1979).

The information charged that Parmer debauched and depraved the morals of a boy under the age of 17 years by lewdly inducing the boy to carnally know Parmer. The Sheridan County District Court in its order dismissing the information "found that an offense under NEB. REV. STAT. Sec. 28-805 (a) required the participation of three separate persons, to-wit: a minor child under the age of seventeen years, a person [not a minor child] who procures or lewdly induces that minor child, and the person that the minor child carnally knows as a result of the lewd inducement." The court also found that only the person who procures or lewdly induces a minor child may be punished under § 28-805(a) and "that the person that the minor child carnally knows cannot be convicted under that statute." We reverse.

In construing this statute, we are reminded that "'A statute is not to be read as if open to construction as a matter of course. Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain the meaning. In the absence of anything to indicate the contrary, words must be given their ordinary meaning. It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language. Neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute.'" *O'Neill*

Production Credit Assn. v. Schnoor, 208 Neb. 105, 108, 302 N.W.2d 376, 378 (1981); *Ragland v. Norris P.P. Dist.*, 208 Neb. 492, 304 N.W.2d 55 (1981).

Section 28-805(1)(a) reads: "Any person not a minor commits the offense of debauching a minor if he or she shall debauch or deprave the morals of any boy or girl under the age of seventeen years by: (a) Lewdly inducing such boy or girl carnally to know any other person . . . ."

The words "any other person" are open to two reasonable constructions. The first is that "any other person" refers only to the person that is lewdly inducing the boy or girl. Under this construction, the person that lewdly induces the boy or girl would not violate the statute if he or she was also the person carnally known by the boy or girl. The only time the inducer would violate the statute under this construction is when the person carnally known by the minor boy or girl is a third person. This was the construction given to the statute by the District Court.

The second possible construction is that the words "any other person" could mean any person other than the minor boy or girl. This construction would make it unlawful for a person, not a minor, to lewdly induce a boy or girl under the age of 17 years to carnally know (1) the person that is lewdly inducing the minor boy or girl, or (2) any person other than the boy or girl that is being lewdly induced.

A penal statute is required to be strictly construed and should be given a sensible construction. *State v. Robinson*, 202 Neb. 210, 274 N.W.2d 553 (1979). A statute should be construed in the context of the object sought to be accomplished, the evils and mischiefs that are sought to be remedied, and the purpose for which it serves. *State v. Lewis*, 184 Neb. 111, 165 N.W.2d 569 (1969).

When the language used in a statute is ambiguous and it becomes necessary to construe it, the principal objective is to determine the intent of the Legislature

and to give it effect. *PPG Industries Canada Ltd. v. Kreuscher*, 204 Neb. 220, 281 N.W.2d 762 (1979).

The legislative intention is to be determined from the statute taken as a whole, and the courts may properly consider the history of its passage. *Pettigrew v. Home Ins. Co.*, 191 Neb. 312, 214 N.W.2d 920 (1974); *PPG Industries Canada Ltd. v. Kreuscher, supra.*

Nebraska has had a statute prohibiting debauchery of a minor since 1921. From 1921 to 1951, it was unlawful for anyone to debauch or deprave the morals of a boy under the age of 21 years by lewdly inducing the boy to carnally know any female person. 1921 Neb. Laws, Ch. 244, § 1, p. 849; Comp. Stat. § 9787 (1922); Comp. Stat. § 28-930 (1929); Neb. Rev. Stat. § 28-929 (1943). In 1951 the debauchery statute was amended to read: "Whoever shall debauch the person or deprave the morals of any boy or girl under the age of twenty-one years, (1) either by lewdly inducing such boy carnally to know any female person, or lewdly inducing such girl carnally to know any male person . . . ." 1951 Neb. Laws, Ch. 82, § 1, p. 244.

The statute prohibited sexual conduct involving persons of opposite sexes. It did not specifically prohibit sexual conduct between members of the same sex.

The debauchery statute remained substantially unchanged until 1977. In 1977 there was a complete revision of the Nebraska Criminal Code. As a result, 1977 Neb. Laws, L.B. 38, was passed. Since no history can be found showing the Legislature's reasons for the changes in the debauchery statute, we must attempt to determine what conduct the Legislature sought to prohibit and interpret the language of this statute so as to give effect to the Legislature's intention.

The language of the statute no longer specifies that the victim and the person carnally known must be of the opposite sex. It is therefore logical to infer that the Legislature intended the new statute to protect minor children from being lewdly induced to carnally know persons of either sex.

Viewed in this fashion, the language used accomplishes that purpose. While the logical and grammatical construction of "any other person" would suggest three persons are required, we prefer a construction that gives effect to a more likely intention, that is, the prohibition of solicitation by adults of minor children for homosexual purposes. We therefore construe "any other person" to mean any person other than the victim.

REVERSED.

CLINTON, J., dissenting.

I dissent for the reason that this court is not free to rewrite a statute defining a crime. In this case the statute in question is not ambiguous and needs no interpretation. It reads: "Any person not a minor commits the offense of debauching a minor if he or she shall debauch or deprave the morals of any boy or girl under the age of seventeen years by:

"(a) Lewdly inducing such boy or girl carnally to know any other person . . . ." Neb. Rev. Stat. § 28-805 (Reissue 1979).

The plain meaning of the foregoing language, determined from the words and sentence structure, is that the term "other person" refers to a person other than the two described in the statute, i.e., other than the victim and other than the person who induces. The majority opinion suggests another "reasonable" meaning, and we quote from the opinion: "The second possible construction is that the words 'any other person' could mean any person other than the minor boy or girl. This construction would make it unlawful for a person, not a minor, to lewdly induce a boy or girl under the age of 17 years to carnally know (1) the person that is lewdly inducing the minor boy or girl, or (2) any person other than the boy or girl that is being lewdly induced." The words in the quoted paragraph, "any person other than the boy or girl that is being lewdly induced," demonstrate the incongruity of the second

"reasonable construction." One cannot carnally know one's self.

The information charged the defendant Parmer in the following language: "JIMMY L. PARMER late of the county aforesaid, did, on or about the first day of March A.D. 1980, in the County of Sheridan and State of Nebraska aforesaid, being a person over the age of majority, did then and there debauch or deprave the morals of a boy under the age of seventeen years, Donald Spencer (Jay) Little, by lewdly inducing Donald Spencer (Jay) Little to carnally know another person, to wit: Jimmy L. Parmer." The record shows that the defendant Parmer was originally charged with first degree sexual assault, which is defined by statute as follows: "Any person who subjects another person to sexual penetration and (a) overcomes the victim by force, threat of force, express or implied, coercion, or deception, (b) knew or should have known that the victim was mentally or physically incapable of resisting or appraising the nature of his or her conduct, or (c) the actor is nineteen years of age or older and the victim is less than sixteen years of age is guilty of sexual assault in the first degree." Neb. Rev. Stat. § 28-319(1) (Reissue 1979).

Reading between the lines in this case, it would appear that the act between the parties was consensual and, because of the "victim's" age, the first degree charge would not stand.

In the State of Nebraska no act is a crime except if it be made so by the Legislature. This has been the law from the time of the adoption of our Constitution up to the present time, and this court has repeatedly so held.

It appears from the statutes we have referred to that the Legislature determined that consensual sodomy (or other sexual intercourse) with a person 16 years of age or older would not be a crime. § 28-319. I may not agree with that legislative judgment, but that is for the Legislature and not for this court to make.

Section 28-318(5) defines the pertinent term as

follows: "Sexual penetration shall mean *sexual intercourse in its ordinary meaning*, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of the actor's body or any object manipulated by the actor into the genital or anal openings of the victim's body which can be reasonably construed as being for nonmedical or nonhealth purposes. Sexual penetration shall not require emission of semen . . . ." (Emphasis supplied.) Would this court react in the same way if the act involved male and female and was fornication and not sodomy? Logically, it would have to in the light of the definition of sexual penetration.

STATE OF NEBRASKA EX REL.
NEBRASKA STATE BAR ASSOCIATION, RELATOR, V.
MAC H. MCCONNELL, RESPONDENT.

313 N.W.2d 241

Filed December 4, 1981. No. 43994.

Original action.

Judgment of disbarment.

Paul L. Douglas, Attorney General, and Mel Kammerlohr for relator.

Tony J. Redman for respondent.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and HASTINGS, JJ.

CLINTON, J.

This is a disciplinary action brought under the rules of this court against the respondent, Mac H. McConnell, a lawyer licensed by this court to practice law in this state. Respondent is charged with violation of DR 1-102(A) (4) of the Code of Professional Responsibility. The rule in question defines as misconduct the action by a lawyer involving, among other things, dishonesty,

deceit, or misrepresentation. The referee appointed by the court recommended that the respondent be disbarred. There is no dispute in the evidence and the only issue before us is whether the recommended discipline of disbarment is excessive and some other sanctions should be imposed.

The evidence shows that on January 4, 1977, when the respondent was the secretary-treasurer of the Madison County Bar Association he, without authorization, withdrew the sum of $1,500 from the library fund of the association and converted the money to his own use. The conversion was not discovered until March 1980, after the association made a purchase of books in the sum of $1,400 and the check given in payment thereof resulted in an overdraft of the account at the bank. When McConnell had turned over the association's checkbook to his successor in office about 3 years before the purchase, it showed a balance in the account of over $2,000. The account had been inactive for 3 years until the books purchase was made. When the overdraft appeared it was discovered that McConnell had made a cash withdrawal on January 4, 1977, which had not been recorded in the checkbook or otherwise shown in the records of the association. When called upon for an explanation, McConnell at first said he could not remember the transaction. Sometime later he presented to his successor in office a check dated March 17, 1980, drawn upon a savings and loan association in the amount of $1,722.30, and stated that he had deposited the money so it would draw interest and that he had forgotten about the matter. Investigation, however, indicated that the savings and loan account had been opened on March 17, 1980, the same day the check in repayment was drawn. At the hearing before the Committee on Inquiry, McConnell acknowledged that he converted the money to his own use and that he had opened the savings and loan account on March 17, 1980.

The respondent, through his attorney, argues that suspension rather than disbarment is an appropriate

sanction because the respondent, except for this offense, has an otherwise good record and reputation, and that the fact that he did not convert the funds of a client distinguishes the present case from others in which orders of disbarment have been entered.

This court has uniformly imposed the sanction of disbarment in cases of embezzlement or like defalcation by lawyers, and that sanction has not depended upon whether the funds taken were those of a client. See, *State ex rel. Nebraska State Bar Assn. v. Ledwith*, 197 Neb. 572, 250 N.W.2d 230 (1977) (embezzlement by an attorney who was an executor of an estate); *State ex rel. Nebraska State Bar Assn. v. Conover*, 166 Neb. 132, 88 N.W.2d 135 (1958) (conversion by a county judge and county attorney of county funds); *State ex rel. Nebraska State Bar Assn. v. Bremers*, 200 Neb. 481, 264 N.W.2d 194 (1978) (failure to account for funds as guardian and administrator).

JUDGMENT OF DISBARMENT.

DONALD J. DAWSON AND MINA PFEIFLEY DAWSON, HUSBAND AND WIFE, APPELLEES, V. PAPIO NATURAL RESOURCES DISTRICT, APPELLANT.

313 N.W.2d 242

Filed December 4, 1981. No. 44057.

1. **Dismissal and Nonsuit.** The right of a plaintiff to dismiss under the provisions of Neb. Rev. Stat. § 25-601 (Reissue 1979) is not a matter of judicial grace or discretion, but may, where equity requires, be made subject to condition, such as reimbursement for costs.
2. **Eminent Domain: Appeal and Error.** A party to an eminent domain proceeding who does not file a notice of appeal as required by Neb. Rev. Stat. § 76-715 (Reissue 1976) does not maintain a valid cross-appeal which prevents voluntary dismissal of the other party's appeal before final submission.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Reversed and remanded with directions.

Paul F. Peters for appellant.

J. Thomas Rowen of Miller & Rowen for appellees.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

CLINTON, J.

This is an appeal in an eminent domain proceeding making its second appearance in this court. The condemner, the Papio Natural Resources District, filed in the county court of Sarpy County a petition for appointment of appraisers as provided by statute. The appraisers, after their appointment, made an award of $305,210 to the condemnee Dawsons, and as a consequence the condemner acquired the interest in the property which it sought, namely, fee title to 79.5 acres and various easements on additional tracts totaling 21.9 acres. The condemner was dissatisfied with the award and appealed to the District Court for Sarpy County. The condemnee did not appeal as he might have under the provisions of Neb. Rev. Stat. §§ 76-715 and 76-715.01 (Reissue 1976) within the 30 days after the filing of the award, but later filed a notice of appeal and a petition on cross-appeal. The condemner then filed a motion to quash the cross-appeal. The court took the motion under advisement.

In the trial before a jury the condemnee received a verdict for $450,000, and the court awarded attorney fees and costs totaling $59,336.80. The condemner then appealed to this court from both the verdict and the court order. We reversed and remanded for a new trial because of the erroneous reception of certain valuation evidence and because the evidence on damages was speculative and conjectural. *Dawson v. Papio Nat. Resources Dist.*, 206 Neb. 225, 292 N.W.2d 42 (1980).

Prior to retrial, the condemner renewed his motion to strike the condemnee's pleading relating to the "cross-appeal." The court then ruled that the trial would be only on the condemner's petition.

On the third day of retrial, before the cause was submitted to the jury and after various objections to evidence and motions to strike by the condemner were overruled, the condemner moved to dismiss its appeal, both orally and in writing. The court took these motions under advisement.

The jury returned a verdict of $404,000. From that award and an allowance by the court of attorney fees in the amount of $81,531.07, the condemner again appeals to this court.

It assigns numerous alleged errors by the trial court, including the following: (1) Errors in the admission of evidence and in denying its motions to strike opinion evidence as to the value of the property taken or damaged. These motions related mostly to foundation for opinion testimony and evidence of claimed comparable sales. (2) The refusal of the trial court to permit the condemner to dismiss the action. (3) The refusal of the trial court to stay the proceedings until there was revivor as to the interest of the condemnee Mina Dawson who died during the first trial of the case.

We find the second assignment meritorious and reverse and remand with directions for entry of judgment in accordance with the conditions in this opinion hereinafter set forth.

The condemner urges that under the provisions of Neb. Rev. Stat. § 25-601 (Reissue 1979) and cases decided thereunder, it has an absolute right to dismiss its appeal prior to the submission of the cause to the jury. It cites, in addition to the statute, the following recent opinions of this court: *Gebhart v. Tri-State G. & T. Assn.*, 181 Neb. 457, 149 N.W.2d 41 (1967); *Koll v. Stanton-Pilger Drainage Dist.*, 207 Neb. 425, 299 N.W.2d 435 (1980). The condemnee argues the condemner is not a plaintiff within the provisions of § 25-601, and in any event, permitting the condemner to dismiss its appeal after having received the benefit of a reversal and having put the condemnee to substantial expense would be an injustice.

Section 25-601 provides in part: "An action may be dismissed without prejudice to a future action (1) by the plaintiff, before the final submission of the case to the jury, or to the court where the trial is by the court . . . . In all other cases on the trial of the action the decision must be upon the merits."

This court has held that the right of a plaintiff to dismiss under the provisions of § 25-601 is not a matter of judicial grace or discretion. *Poppert v. Brotherhood of R. R. Trainmen*, 187 Neb. 297, 189 N.W.2d 469 (1971); *Gebhart v. Tri-State G. & T. Assn.*, *supra*; *Koll v. Stanton-Pilger Drainage Dist.*, *supra*. The right to dismiss is not an exclusive right of the plaintiff, but also applies to a defendant with reference to his counterclaim. *Feight v. Mathers*, 153 Neb. 839, 46 N.W.2d 492 (1951); *Harbert v. Mueller*, 156 Neb. 838, 58 N.W.2d 221 (1953). There are, however, limitations on the right to dismiss. A party's right to dismiss does not affect the right of the other party to proceed on its petition or counterclaim. *Harbert v. Mueller*, *supra*; *Feight v. Mathers*, *supra*. In some circumstances the court may attach conditions to the dismissal where justice and equitable principles so require. *Feight v. Mathers*, *supra*.

We now discuss the question of the condemner's status as a party and whether § 25-601 is inapplicable because the condemner is not a plaintiff. An appeal from an award of appraisers in an eminent domain proceeding is sui generis as far as the designations and burden of the parties are concerned, and they do not fit precisely within the literal terms of § 25-601. Either the condemner or the condemnee may appeal from the appraisers' award of damages by filing notice of appeal with the county judge within 30 days of the filing of the award. §§ 76-715, 76-715.01. The case is docketed showing the condemnee as plaintiff and the condemner as defendant regardless of whether the condemnee, condemner, or both parties file the appeal. Neb. Rev. Stat. § 76-717 (Reissue 1976); *Estate of Tetherow v. State*,

193 Neb. 150, 226 N.W.2d 116 (1975). If property valuation is the only issue, the condemnee has the burden of proof. The condemner has the burden of proving mitigation of damages by reason of special benefits, if any are claimed. *State v. Mahloch*, 174 Neb. 190, 116 N.W.2d 305 (1962). The condition precedent to exercise of the right of eminent domain, viz., an attempt to agree with the owner on the amount of damages and the failure to agree, must be alleged and proved by the condemner, and if denied, the burden of proof on this issue is on the condemner. *Higgins v. Loup River Public Power Dist.*, 157 Neb. 652, 61 N.W.2d 213 (1953). The party first appealing has the duty of filing the first pleading. *Estate of Tetherow v. State, supra.* In this case the condemner filed the first pleading, which contained all the necessary jurisdictional allegations. In order to maintain a cross-appeal on the issue of valuation, the party not first appealing must file a notice of appeal within 30 days of the filing of the award. *Gebhart v. Tri-State G. & T. Assn.*, 181 Neb. 457, 149 N.W.2d 41 (1967) (overruled in part — *Neumeyer v. Omaha Public Power Dist.*, 188 Neb. 516, 198 N.W.2d 80 (1972), holding filing of bond not jurisdictional).

As already noted, the record discloses the condemnee did not file a timely notice of appeal. As such, no cross-appeal exists which would affect the condemner's right to dismiss the cause, assuming it did possess such a right. If the condemnee had filed a cross-appeal, the cross-appeal would not have been subject to dismissal and the issue in this case, viz, the amount of damages and the burden of proof, would not have changed.

One other point deserves notice. Section 25-601, by its terms, refers to dismissal without prejudice. This raises another seeming anomaly. Neither a condemner nor a condemnee can, as a practical matter, dismiss without prejudice except in the largely theoretical circumstance where a new notice of appeal could be timely filed. If only one of the two parties has appealed and the appeal is dismissed, the effect is simply to reinstate the

appraiser's award which, if deposited with the county judge within the 60 days provided by statute, has the effect of transferring the title to the property and the condemnee is then accordingly entitled to the proceeds. Neb. Rev. Stat. §§ 76-711, 76-712 (Reissue 1976).

This court in *Gebhart v. Tri-State G. & T. Assn.*, *supra*, recognized that under the provisions of § 25-601 the condemnees, plaintiffs in that case as they filed the first pleading, had a statutory right to dismiss the appeal where the condemner had not maintained a valid cross-appeal when failing to comply with the provisions of Neb. Rev. Stat. § 76-715 (Reissue 1976) by filing its notice of appeal within the 30 days from the filing of the award of the appraisers. It would seem this court has, in *Gebhart v. Tri-State G. & T. Assn.*, *supra*, already decided the issue. In that case this court held the condemnees could dismiss their appeal, and the condemner could not object because it had not perfected a cross-appeal. The right to dismiss under the statute ought not depend upon how the parties are designated for purposes of docketing the case, but, rather, upon which party took the appeal and is therefore the party complaining of the result of the award of the appraisers. Neither is the right affected by the statute's reference to a dismissal without prejudice. At common law, a party ordinarily has a legal right to discontinue or dismiss his suit, or to take a voluntary nonsuit, provided he does it at the proper time and the rights of the defendant are not prejudiced by the dismissal. 27 C.J.S. *Dismissal & Nonsuit* §§ 5, 7 (1959). Section 25-601 is not inconsistent with the common-law right of the defendant to take a dismissal with prejudice.

Nor is the right affected by the fact that it comes after an appeal and a remand. The Supreme Court of California in *Schubert v. Bates*, 30 Cal. 2d 785, 185 P.2d 793 (1947), said that after reversal of a judgment the parties are restored to their original rights, including the right of the plaintiff to dismiss the action if dismissal will not interfere with the defendant's right to

appropriate affirmative relief. Where the motion to dismiss comes after a remand for trial de novo, the right of the party to dismiss remains, except where the remand is for some other purpose, such as the entry of judgment. 5B C.J.S. *Appeal & Error* § 1974 (1958).

As we have noted earlier, the right to dismiss may be made subject to conditions where justice so dictates. *Feight v. Mathers*, 153 Neb. 839, 46 N.W.2d 492 (1951). In *Feight*, after noting that a defendant may dismiss a cross-claim demanding affirmative relief under the same rules and conditions as plaintiff dismisses a complaint and that the right to dismissal is not a matter of judicial grace, we said at 844-45, 46 N.W.2d at 495: "'But the court may, when justice requires it, impose reasonable terms, or refuse dismissal. Horton v. State, 63 Neb. 34.' Blue River Power Co. v. Hronik, 116 Neb. 405, 217 N.W. 604.

"In Horton v. State, 63 Neb. 34, 88 N.W. 146, the court, in seeking to clarify when such refusal might be proper, stated: 'This discretion has been exercised to require payment of costs. Sheedy v. McMurtry, supra; to protect rights of attorneys under agreements as to fees, Bryon v. Durrie, 6 Abb. New Cas. (N.Y.), 135; to protect a defendant in his plea of estoppel from the danger of possible transfer of a lien, Stevens v. Railroads, 4 Fed. Rep., 97; and to enable a defendant to obtain restitution, Lane v. Morton, 81 N.C., 38. Of course, there must be some real and substantial right which has accrued to the adverse party in the very cause sought to be dismissed.'

"The court in Horton v. State, *supra*, then goes on to state: 'Collateral consequences, such as subjection of the defendant to further litigation, or purposes not connected with the action in question, will not be allowed to interfere with the right given to plaintiffs by statute. Banks v. Uhl, 6 Nebr., 145. Hence, ordinarily, the dismissal will be allowed as of course. Beals v. Western Union Telegraph Co., 53 Nebr., 602 (601).'

"In Blue River Power Co. v. Hronik, *supra*, wherein

these questions are again fully discussed, the court held: 'The injury occasioned by the dismissal must be such as to deprive defendant of some substantial right not available in a second suit, or that may be endangered by the dismissal. Young v. Georgia Home Ins. Co., 131 Ga. 54; Stevens v. Railroads, 4 Fed. 97; Kemper v. Calhoun, 111 Va. 428. The ordinary inconvenience of double litigation is not a legal prejudice, *and can be compensated by costs.* Gilmore v. Bort, 134 Fed. 658; Penn Phonograph Co. v. Columbia Phonograph Co., 132 Fed. 808; Southern Cotton Oil Co. v. Shore, 171 N. Car. 51; Pullman's Palace Car Co. v. Central Transportation Co., 171 U.S. 138. * * * We are of the opinion that the only discretion which may be exercised in the matter is the protection of any rights which have accrued to defendant as a result of the bringing of the action, such as the preservation of a counterclaim, the restitution of property of which he has been deprived, *the recovery of his costs, and the like;* that in the absence of such considerations the right to dismiss is absolute; that the expense of employing attorneys in defending the action, or the liability to further litigation over the same matter, are not subjects calling for the exercise of discretion by the court as constituting legal prejudice to defendant.'" (Emphasis supplied.)

In the case before us, the condemner received the benefit of the remand for a new trial. Had it dismissed at that time before retrial, the effect would have been to simply restore the award of the appraisers. However, it chose to retry, as was its right. Electing that course after trial started put the condemnee to considerable cost which he would not otherwise have had. We believe this is the type of case in which some conditions should be attached to the dismissal. We find that these conditions should be that the condemner pay the costs which were awarded at the first trial, to wit, the sum of $59,336.80 awarded as attorney fees and costs, and the costs of the second trial, including expert witness fees but excepting the award of attorney fees. The cause is

remanded with directions to grant the condemner's motion to dismiss and to enter judgment for attorney fees and costs of the first trial in the amount above stated, and costs in the second trial, including expert witness fees but excepting the attorney fees awarded at the end of the second trial. Each party shall pay its own costs on this appeal.

REVERSED AND REMANDED WITH DIRECTIONS.

WHITE, J., concurring in part, and in part dissenting.

I concur in that part of the opinion which holds that the condemner had the absolute right of dismissal prior to submission to the jury.

I do not agree that this court may initially fix an attorney fee. That matter should be remanded to the District Court pursuant to Neb. Rev. Stat. § 76-720 (Reissue 1976), which states: ". . . or if appeal is taken by the condemner and the amount of the final judgment is not less than eight-five per cent of the award . . . the court may in its discretion award to the condemnee a reasonable sum for the fees of his attorney and for fees necessarily incurred for not more than two expert witnesses."

The term final judgment refers to the amount finally recovered as damages. *Keller v. State*, 184 Neb. 853, 172 N.W.2d 782 (1969). Here the amount of the final judgment is the award of the appraisers and obviously is not less than 85 percent of the appraisers' award. The statute does not require as a condition the rendition of a verdict, simply that there be a final judgment. The statute requires that the allowances be made initially by the court to which the appraisers' award was appealed, i.e., the District Court.

I would remand to the District Court for determination of the fees and expenses to be allowed.

KRIVOSHA, C.J., joins in this concurrence and dissent.

SHERMAN C. HUSTED, APPELLEE, V. PETER KIEWIT AND SONS CONSTRUCTION CO., APPELLANT.

313 N.W.2d 248

Filed December 4, 1981. No. 44093.

1. **Workmen's Compensation: Appeal and Error.** Findings of fact made by the compensation court will not be set aside on appeal unless clearly wrong. However, where there is not sufficient competent evidence in the record to warrant the making of the award, or the findings of fact do not support the award, this court must modify, reverse, or set aside the award.
2. **Workmen's Compensation: Evidence: Proof.** Where the injury is not of an objective nature, a causal connection between the accident and the disability must be established by expert medical testimony.
3. **Workmen's Compensation: Proof.** A workmen's compensation award cannot be based upon possibility or speculation. If an inference favorable to the claimant can only be reached upon the basis of possibility or speculation, he cannot recover.
4. ____: ____. An award cannot be based upon conflicting inferences of equal degrees of probability.

Appeal from the Nebraska Workmen's Compensation Court. Affirmed as modified and remanded for further proceedings.

Larry E. Welch and Timothy J. Augustyn of Gross, Welch, Vinardi, Kauffman & Day, P.C., for appellant.

Richard D. Brown and Robert F. Martin of Martin & Brown for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

BOSLAUGH, J.

This is an appeal in a proceeding under the Nebraska Workmen's Compensation Act.

The plaintiff was employed as a carpenter by the defendant. He injured his lower back on October 11, 1976, while helping lift a piece of "petrocal" roofing onto a conveyor. It is not disputed that the plaintiff's back injury arose out of and in the course of his employment.

After the accident the plaintiff was examined and treated by Dr. Minard for the injury to his back. On November 5, 1976, the plaintiff first complained of pain in the area at the base of his neck. The principal issue on the appeal is whether the plaintiff is entitled to compensation for the claimed injury to his neck.

After the hearing before a single judge of the compensation court, the plaintiff recovered an award for temporary total disability and medical and hospital expenses. The court found: "The medical evidence presented by the plaintiff clearly fails to causally connect said cervical disc disorder with the plaintiff's accident of October 10, 1976 . . . ."

Upon rehearing before the three-judge compensation court, with one judge dissenting, the court found that the "cervical disorder" was causally connected to the accident of October 11, 1976. The defendant has appealed to this court.

Immediately after the accident the plaintiff's complaints were of pain in the lower portion of his back. Dr. Minard's initial diagnosis was a herniated intervertebral lumbar disc. The plaintiff was treated with painkillers, muscle relaxants, and bed rest, with the treatment concentrating on the lumbar area of his back. On November 5, 1976, the plaintiff first complained of pain in the area at the base of his neck. Dr. Minard then injected plaintiff's neck area with Kenalog and Xylocaine. On November 8, 1976, the plaintiff was hospitalized for further tests in the lumbar area of his back. A myelogram indicated a ruptured lumbar disc, which was then removed surgically by Dr. Browne.

The plaintiff continued to have pain in his lower back and returned to Dr. Minard for treatment a number of times in early 1977. In May 1977 plaintiff underwent further surgery in the lumbar area of his back, to fuse the spine at the place where the disc had been removed in November. Beginning in August 1977 plaintiff's complaints began to concentrate more on pain in the neck region. Dr. Minard treated the neck complaints

with a cervical traction device, pain medication, and a cervical collar until about November 21, 1977, when Dr. Minard felt that the plaintiff's neck problem had cleared up.

The plaintiff's lower back was still quite painful, and in early 1978 Dr. Minard recommended that he be retrained through vocational rehabilitation services, because the doctor felt that the plaintiff "could never return to work as a common laborer." Beginning in July 1978 the plaintiff began a 1-year training course as a welder through vocational rehabilitation services. He finished the course in May or June 1979. During that year he continued to see Dr. Minard with complaints of constant back pain.

In June 1979, on Dr. Minard's recommendation, the plaintiff attempted to return to work. He worked for 1 week at Wheatland, Wyoming, as a welder, but was terminated by his employer. The plaintiff testified that he was fired because he told his supervisor that he would not do certain tasks because of his back pain; his supervisor testified by deposition that the plaintiff was fired because he complained constantly, although he did not complain about back pain.

On July 6, 1979, the plaintiff again saw Dr. Minard with complaints of both lumbar and cervical pain. The cervical pain was now radiating into his right upper arm and shoulder. Dr. Minard suspected a herniated cervical disc. A cervical myelogram performed by Dr. Browne indicated a herniated cervical disc, and Dr. Browne recommended surgery. The night before the operation was to be performed, the plaintiff was advised that the defendant's insurance carrier would not pay for the cervical operation. The operation was cancelled and the plaintiff left the hospital.

On rehearing, four physicians testified concerning a possible causal connection between the plaintiff's cervical injury and the October 11, 1976, accident. Dr. Minard, the treating physician, testified: "I do not know whether this [cervical disorder] came out of his employ-

ment or not. I have nothing to hang my hat on to say that he hurt his neck working for Peter Kiewit or he did not hurt his neck working for Peter Kiewit."

There was some evidence that at one time Dr. Minard had prepared a report which indicated a causal connection between the October 11, 1976, accident and the cervical injury. That report was destroyed after Dr. Minard was advised that the attorneys requesting the report would be unwilling to pay for it or did not want it. However, Dr. Minard's testimony under oath before the compensation court, and by deposition, was that the cervical problem was not related to the October 11, 1976, accident, and that it was speculation as to whether the injury was "secondary to strictly degeneration or degeneration with trauma superimposed."

Dr. Browne testified that he could not causally connect the cervical disorder to the work accident and that he knew nothing about the plaintiff's cervical complaints until July 1979, nearly 3 years after the accident.

Dr. Kratochvil, who examined the plaintiff in April 1980, at the request of the defendant, made no cervical examination of the plaintiff. He gave no opinion as to a causal relationship between the cervical disorder and the October 11, 1976, accident.

The only medical testimony that attempted to establish a causal relationship between the plaintiff's cervical condition and the October 11, 1976, accident was that of Dr. Brantigan, an orthopedic surgeon who first examined the plaintiff on November 7, 1979. Dr. Brantigan testified that the first major complaint by the plaintiff with regard to his neck represented a manifestation of the cervical disc injury. He further testified that in his opinion the injury to the cervical spine "occurred sometime between the time of the injury, October 11th, and the time that it was originally recorded that he had a major complaint of his neck, which was November 5th. I feel that the injury to his cervical spine occurred sometime during that 20-day interval." Upon being asked whether the cervical injury

occurred at the time of the October 11, 1976, accident or during bed rest following the accident, Dr. Brantigan testified that it was "more likely" that the cervical injury occurred while the plaintiff was lifting than while he was at bed rest. Dr. Brantigan was not examined with respect to degeneration as a cause of the cervical problem.

The findings of fact made by the compensation court will not be set aside on appeal unless clearly wrong. However, where there is not sufficient competent evidence in the record to warrant the making of the award, or the findings of fact do not support the award, this court must modify, reverse, or set aside the award. Neb. Rev. Stat. § 48-185 (Reissue 1978); *Riha v. St. Mary's Church & School, Inc.*, 209 Neb. 539, 308 N.W.2d 734 (1981). See, also, *Spiker v. John Day Co.*, 201 Neb. 503, 270 N.W.2d 300 (1978).

The plaintiff's injuries in this case were not of an objective nature, and medical testimony was required to establish a causal connection between the October 11, 1976, accident and the claimed injuries.

The evidence clearly supports the finding that the plaintiff was totally disabled at the time of the hearings and was unable to perform any work for which he had previous training or experience because of the severity of his low back pain. Although the record does not show that the plaintiff has reached his maximum recovery from the injury to his lower back, it strongly suggests that his disability may well be permanent. Unless there is substantial improvement in the condition of the plaintiff's back, the plaintiff may be entitled to compensation for permanent total disability because of the injury to his lower back.

With respect to the cervical condition, we conclude that the evidence does not support the finding that it was causally connected to the accident of October 11, 1976.

A workmen's compensation award cannot be based upon possibility or speculation. If an inference favor-

able to the claimant can only be reached upon the basis of possibility or speculation, he cannot recover. *Welke v. City of Ainsworth*, 179 Neb. 496, 138 N.W.2d 808 (1965). An award cannot be based upon conflicting inferences of equal degrees of probability.

The finding of the compensation court, of necessity, rested upon the testimony of Dr. Brantigan. At best, Dr. Brantigan could only fix the time when he believed the injury occurred to be within a "range" of 20 days. His opinion amounted to no more than a statement that it was "more likely" the injury occurred on October 11, 1976, than when the plaintiff was at bed rest. This testimony lacked the definiteness and certainty necessary for it to be the basis for a compensation award. See, *Camarillo v. Iowa Beef Processors, Inc.*, 201 Neb. 238, 266 N.W.2d 917 (1978); *Marion v. American Smelting & Refining Co.*, 192 Neb. 457, 222 N.W.2d 366 (1974).

The finding of the compensation court that the plaintiff's "cervical disorder was causally connected to said accident" is set aside and the judgment modified accordingly. The judgment, in all other respects, is affirmed and the cause remanded for further proceedings in conformity with this opinion.

AFFIRMED AS MODIFIED AND REMANDED FOR FURTHER PROCEEDINGS.

WHITE, J., concurring in part, and in part dissenting.

Insofar as the majority suggests that the employee is totally and permanently disabled, I concur in the result. I disagree with the majority in its holding that there was not sufficient medical evidence to sustain a finding that the cervical condition was caused by the accident on or about October 11, 1976. The effect of this finding is that the employee shall be forced to bear entirely the cost of the necessary cervical laminectomy which I believe the evidence sustains was caused by the accident on or about October 11, 1976. After the accident on or about October 11, 1976, plaintiff "was treated in the

typical manner, conservative-type treatment, as an outpatient, with basically bedrest at home." Plaintiff continued to see Dr. David W. Minard and was treated with muscle relaxants and pain medication. On November 5, 1976, Dr. Minard, plaintiff's treating physician, made this note: "Nov 5 . . . Notes no improvement what so ever [sic] neck is quite painful also...."

The evidence relating to the period of time between the date of the accident and the date the plaintiff first complained of neck pain to Dr. Minard indicates that the plaintiff was at home, not working, and resting in bed. It is not contended that plaintiff had experienced any symptoms of cervical neck pain prior to November 5, 1976.

After several examinations and review of previous reports and consultations with other physicians, Dr. John W. Brantigan testified to a question as follows: "Would you state, with reasonable medical certainty, what that opinion is, please?... A My opinion is that, of a reasonable medical certainty, Mr. Husted's lower lumbar problem was caused by the injury as described on October 11, 1976.

"I feel that, of a reasonable medical certainty, the cervical disk rupture occurred between October 11th and November 5th of 1976.

"I have a difficult time bridging that 20-day gap in assigning cause relationship to that injury, but my opinion is that, given the history as described and excluding other history that may have been relevant, of which I am unaware, it is more likely that the cervical disk was injured in the lifting accident than it was in the bed rest period during that 20-day time.

"Now, I feel that if there was other history involved that I'm not aware of — for example, if the patient had a fall on his head or did some other strenuous lifting or something of that nature — then my opinion would be different. But, given the history as described, that is my opinion."

The testimony of Dr. Brantigan, that it was more

likely (than not) that the cervical injury occurred as a result of the accident on or about October 11, 1976, was sufficient evidence on which the compensation court could have based its decision to find the jury compensable.

In *Lane v. State Farm Mut. Automobile Ins. Co.*, 209 Neb. 396, 411, 308 N.W.2d 503, 512 (1981), we said: "Although it is generally stated that medical testimony must be given with 'reasonable medical certainty,' we have been unable to find any Nebraska case which specifically so states. It has frequently been held that medical testimony couched in terms of 'possibility' is not sufficient, although when such testimony is in terms of 'probability' it is sufficient. We have held that 'reasonable certainty' and 'reasonable probability' are one and the same thing." More likely (than not) is the equivalent of probability. *People v. Erkinger*, 119 Cal. App. 2d 551, 259 P.2d 492 (1953); *Aultman v. Dallas Ry. & Term. Co.*, 152 Tex. 509, 260 S.W.2d 596 (1953); *Hallum v. Omro*, 122 Wis. 337, 99 N.W. 1051 (1904). The majority suggests that Dr. Brantigan in later testimony somewhat modified or weakened his previous opinion. We do not here decide the truth of Dr. Brantigan's testimony. We simply decide whether it is legally sufficient. The opinion that Dr. Brantigan expressed with respect to the causation of the cervical injury was given in terms which are to all intents and purposes identical with the standard required under Nebraska law for proof of causation. Any testimony which may cause a trier of fact to doubt Dr. Brantigan's conclusions does not thereby destroy the sufficiency of favorable evidence which supports the decision of the three-judge panel of the compensation court.

The decision of the three-judge compensation court is correct and should be affirmed.

KRIVOSHA, C.J., and BRODKEY, J., join in this concurrence and dissent.

STATE OF NEBRASKA, APPELLEE, V. HEZEKIAH PITTMAN, APPELLANT.

313 N.W.2d 252

Filed December 4, 1981. Nos. 44126, 44127.

1. **Miranda Rights: Confessions.** An accused who has expressed his desire to deal with the police only through counsel is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.
2. ____: ____. *Miranda* does not protect an accused, even though he has requested counsel, from a spontaneous admission made under circumstances not induced by the investigating officers or during a conversation not initiated by the officers.
3. **Evidence: Motions to Suppress.** When the evidence upon a motion to suppress is in conflict, the decision of the trial court will not be reversed in the absence of an abuse of discretion.
4. **Motions for New Trial: Evidence.** Newly discovered evidence must be of such a nature that if it had been offered and admitted at the former trial it probably would have produced a substantially different result.
5. **Trial: Evidence.** An exhibit is admissible, so far as identity is concerned, when it has been identified as being the same object about which testimony was given.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Affirmed.

Paul E. Watts of Watts & Moran for appellant.

Paul L. Douglas, Attorney General, and Harold Mosher for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

BOSLAUGH, J.

The defendant was charged, in separate informations, with three counts of robbery and three counts of use of a firearm in the commission of a felony. After a consolidated trial to a jury, the defendant was found guilty on all counts. He was sentenced to 15 to 30 years' imprisonment on each robbery count, the sentences to run concurrently with each other, and 5 to 10 years' imprisonment on each use of a firearm count, the sentences

to run concurrently with each other but consecutively to the robbery terms. The defendant has appealed and has assigned as error the failure to sustain his motion to suppress; the insufficiency of the evidence to sustain his conviction; the failure to sustain his motion for a new trial for newly discovered evidence; and the failure to grant a mistrial because of prosecutorial misconduct.

The robberies involved in these cases occurred on May 30, 1980, at Godfather's Pizza at 99th and Q Streets; on June 6, 1980, at the Venice Inn at 69th and Pacific Streets; and on June 7, 1980, at Mr. Steak at 1300 South 72nd Street, all in Omaha, Nebraska.

Charles Elsinger, an accomplice of the defendant who had previously pleaded guilty to charges based on these robberies, testified for the State. Elsinger testified that the defendant had participated in all three robberies by helping "set me up" in that he had showed Elsinger where the restaurants were and had described their respective layouts to him; that the defendant gave Elsinger the pistol used in the Venice Inn robbery; and that he and the defendant had split the "take" from each robbery. Elsinger's sister Tracy also testified for the State and corroborated Elsinger's testimony in some respects concerning the Godfather's robbery.

Elsinger and Tracy and four other persons were arrested at Bart's Motel in Council Bluffs on June 18, 1980. At the time of the arrest, a .20-gauge sawed-off shotgun was found in their motel room. Elsinger testified the shotgun was used in the Mr. Steak robbery. Elsinger and Tracy gave statements to the Omaha police implicating the defendant in the robberies. The defendant was arrested on July 31, 1980.

The robberies were proved by independent witnesses who had been present at each of the restaurants at the time the robberies occurred. The testimony of Elsinger implicated the defendant in each of the robberies. The evidence was clearly sufficient, if believed, to sustain a finding of guilty on all counts beyond a reasonable doubt.

After the defendant had been arrested, he was questioned by several police officers about the robberies. In support of a motion to suppress, the defendant testified that the officers had ignored his requests to consult a lawyer before proceeding further. The officers testified that the defendant had only mentioned an attorney once, and that was in the form of a question, after he had been advised of his rights and had stated that he was willing to make a statement. According to the officers' testimony, the defendant said something to the effect that maybe he ought to talk to an attorney. At that point Officer O'Connor, who was in charge of the interrogation, told the defendant that they would stop questioning him and picked up his papers and began to leave the room. The defendant then initiated some conversation with the officers with regard to his being "railroaded" by the Elsingers, and the officers responded that they had only one side of the story and would be happy to hear the defendant's side. According to the officers, the defendant then began to discuss the matter with them and responded to their questions, never again mentioning an attorney. The trial court found that the defendant had waived his rights and his statements to the police were voluntary and admissible.

In *Edwards v. Arizona*, ___U.S.___, 101 S. Ct. 1880, 1885, 68 L. Ed. 2d 378 (1981), the U.S. Supreme Court held: "[A]n accused, such as [petitioner], having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, *unless the accused himself initiates further communication, exchanges or conversations with the police.*" (Emphasis supplied.) In *United States v. Grant*, 549 F.2d 942, 946 (4th Cir. 1977), the U.S. Court of Appeals for the Fourth Circuit held: "[*Miranda* does not] protect an accused, even though he has requested counsel, from a spontaneous admission made under circumstances not induced by the investigating officers *or during a conversation not initiated by the officers.*" (Emphasis

supplied.)

In the present case, upon conflicting evidence, the trial court found that the defendant had not invoked his right to counsel but had knowingly and intelligently waived the right.

When the evidence upon a motion to suppress is in conflict, the decision of the trial court will not be reversed in the absence of an abuse of discretion. *State v. Weinacht*, 203 Neb. 124, 277 N.W.2d 567 (1979). See, also, *State v. Prim*, 201 Neb. 279, 267 N.W.2d 193 (1978).

The defendant next contends that the trial court erred in overruling his motion for new trial based upon newly discovered evidence. The newly discovered evidence was a claim that Charles and Tracy Elsinger had "recanted" their testimony. The trial court found that the Elsingers had not recanted their testimony to the extent that a new trial was required, and overruled the motion.

The evidence at the hearing on the motion for new trial consisted of a letter from Tracy Elsinger to the defendant's mother, and an affidavit of John North. North had been hired by the defendant's mother to investigate the matter after she had received Tracy's letter. North's affidavit was to the effect that Charles Elsinger had told some person at the state penitentiary that he, Elsinger, had lied under oath at the defendant's trial when he testified that he threw a gun into the Missouri River. The affidavit also stated that Elsinger may have implicated the defendant in more robberies than he was actually involved in. The letter from Tracy Elsinger did not actually recant her testimony, but rather stated that she had been pressured into testifying.

In *State v. Record*, 208 Neb. 90, 92, 302 N.W.2d 367, 368 (1981), we recently stated: "Newly discovered evidence must be of such a nature that if it had been offered and admitted at the former trial it probably would have produced a substantially different result." *State v. Hortman*, 207 Neb. 393, 397, 299 N.W.2d 187, 189

(1980), states: "We have stated that new evidence tendered in support of a motion for new trial on the ground of newly discovered evidence must be so potent that, by strengthening evidence already offered, a new trial would probably result in a different verdict."

Tracy Elsinger had testified under oath at the trial that she had not wanted to testify, but did so pursuant to a subpoena. Nothing in her letter demonstrates newly discovered evidence which would require that a new trial be granted. The matters in North's affidavit went mainly to the credibility of Charles Elsinger. In *State v. Mays*, 205 Neb. 730, 732, 289 N.W.2d 545, 547 (1980), this court stated: "It would appear that all the evidence maintained by Mays to be newly discovered evidence at best goes to the credibility of one of the State's witnesses . . . . That fact in and of itself is not sufficient to justify the granting of a new trial." A refusal to grant a new trial based on newly discovered evidence will not be reversed absent an abuse of discretion. There was no abuse of discretion here.

The defendant contends the trial court erred in overruling an objection as to foundation made to the offer of the gun used by Elsinger in the Venice Inn robbery. The evidence of the State traced the gun back to the defendant through the defendant's father.

Charles Elsinger stated that he had used the gun in the Venice Inn robbery, and that it had been supplied to him by the defendant. After the robbery, Elsinger left the gun under the seat of the defendant's automobile. An eyewitness to the Venice Inn robbery testified that the gun was used in the Venice Inn robbery. Officer O'Connor testified that he obtained the gun from the defendant's father on August 7, 1980. O'Connor further testified that he then took the gun to police headquarters, put it in a property envelope, and left it locked in the property room. The gun was removed twice, once for firearms examination and once when O'Connor showed the gun to the eyewitness to the robbery. At all other times the gun remained locked

in the property room at police headquarters until O'Connor brought it to court for the trial.

In *State v. Stickelman*, 207 Neb. 429, 439, 299 N.W.2d 520, 526 (1980), we stated: "[A]n exhibit is admissible, so far as identity is concerned, when it has been identified as being the same object about which the testimony was given." The foundation here was sufficient.

The defendant's claim of error based on prosecutorial misconduct relates to a number of incidents which occurred during the trial. The principal claim relates to testimony by Charles Elsinger that he wanted to be imprisoned in a different institution.

The testimony of Elsinger about his wish to serve his sentence in another state appeared in the context of the prosecutor's questions about inducements which might have been offered to Elsinger to encourage him to testify for the State. No reference was made to possible incarceration of the defendant, and the defendant's name was not mentioned during the questioning.

The evidence was proper and there was no prejudice to any substantial right of the defendant. The motion for a mistrial was properly overruled.

There being no error, the judgment is affirmed.

AFFIRMED.

WAYNE T. SACHER ET AL., APPELLANTS, V. TACO GRANDE OF IOWA, INC., A CORPORATION, ET AL., APPELLEES.

313 N.W.2d 257

Filed December 11, 1981. No. 43429.

1. **Leases: Liability.** A termination of a lease which the lessor elects to assert does not terminate accrued liabilities under the lease, but it does terminate liabilities to accrue in the future, such as rent, except where, by express provision in the lease, termination is not to affect the accrual of such liabilities.
2. **Contracts: Intent.** A contract will be construed most strongly against the party preparing it when there is a question as to its meaning.

Appeal from the District Court for Douglas County: JOHN T. GRANT, Judge. Affirmed.

William E. Pfeiffer of Spielhagen, Pfeiffer & Miller Associates for appellants.

Ronald H. Stave and J. Michael Coffey of Sodoro, Johnson, Daly, Stave, Cavel & Coffey for appellees.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

MCCOWN, J.

This is an appeal in a jury-waived action for damages arising out of a lease agreement and written guarantee. The District Court entered judgment in favor of the plaintiff lessors for $5,170.48, and they have appealed.

The pertinent facts have been stipulated or are without dispute. Plaintiff lessors entered into the lease on March 24, 1969, with Golden Wishbone, Inc., a Nebraska corporation, for a term of 15 years. In August of 1971 Golden Wishbone assigned the lease to the defendant Taco Grande of Iowa, Inc. The lessors consented to the assignment, and performance of the lease conditions was guaranteed by the individual defendants. Taco Grande vacated the premises in the early part of 1978 and failed to make any rental payments for approximately 4 months before lessors took any action. On May 4, 1978, lessors served notice on Taco Grande that the lease was terminated for failure to make required rental payments. Following termination, lessors made some repairs to the building, and then relet the premises. The new rental payments were approximately $200 a month less than those set forth in the original lease. The rental loss after termination and the expenses incurred in the reletting totaled approximately $20,000. Rentals accrued prior to termination, and the reasonable value of necessary repairs, amounted to $5,170.48.

The District Court entered judgment against the defendant lessee and the defendant guarantors in the

sum of $5,170.48, but denied recovery for damages accruing after the lessors had elected to terminate the lease and given written notice of termination to the lessee. The plaintiff lessors have appealed.

The applicable provision of the lease is Article X, relating to default: "Should default be made by the LESSEE in the payment of the rental herein provided . . . then . . . the LESSORS may, if the LESSORS so desire, declare this lease terminated, and the LESSORS may re-enter said premises and hold and enjoy the same thenceforth as if these presents had not been made, *without prejudice, however, to any right of action or remedy* of the LESSORS in respect to any breach by the LESSEE of any of the covenants herein contained. *In case LESSORS do not elect to take advantage of the right to terminate this lease conferred by the foregoing provision of this paragraph,* the LESSORS shall nevertheless have and LESSORS are hereby expressly given the right to re-enter the said premises, with or without legal process, should any of the events hereinbefore specified take place or occur, and to remove . . ., and if the LESSORS so desire, to relet the said premises or any part thereof upon such terms and to such person or persons and for such periods as may seem fit to the LESSORS, and in case of such reletting, the *LESSEE shall be liable to the LESSORS for the difference between the rents and payments herein reserved* and agreed upon for the residue of the entire stipulated term of this lease *and the net rent for such residue of the term realized by the LESSORS by such reletting,* such net rent to be determined . . . ." (Emphasis supplied.)

The lessors contend on appeal that the language "without prejudice, however, to any right of action or remedy of the LESSORS in respect to any breach by the LESSEE of any of the covenants herein contained," appended to the provision authorizing termination, lets the lessors terminate the lease and, at the same time, retain and enforce any rights they had under the lease

as if they had not elected to terminate.

The general rule is that a termination of a lease which the lessor elects to assert does not terminate accrued liabilities, including accrued rent, under an option for termination, but it does terminate liabilities to accrue in the future, such as rent, except where, by express provision in the lease, termination is not to affect the accrual of such liabilities. See, 49 Am. Jur. 2d *Landlord and Tenant* §§ 1013 and 1054 (1970); 52 C.J.S. *Landlord & Tenant* § 490 (1968); Restatement (Second) of Property § 12.1 (1977). Comment g to § 12.1 of the Restatement states at 389: "The obligation of the tenant to pay rent does not arise for any period after the lease is terminated. The parties to the lease may provide that the tenant will continue to make payments in an amount equal to the rent he had been paying, or in some other amount, when the lease is terminated prematurely. Under such an agreement, the landlord may collect these payments, but the payments due will not be rent, and this may have important remedial significance . . . ."

In the present case the critical "without prejudice" language with respect to breaches of the lease covenants by the lessee did not specify whether it applied to breaches which occurred prior to termination or after termination, and in that respect was, at best, ambiguous. The trial court held that the critical language gave the lessors all legal rights existing in connection with a termination and, in effect, determined that the critical language referred to breaches of covenants by the lessee which had occurred prior to termination and did not apply to breaches of covenants occurring after termination. The trial court found that the lessors had two separate alternative remedies set out in the lease in the event of the lessee's breach of covenant to pay rent and that lessors had elected the remedy of termination.

This court has consistently held that a contract will be construed most strongly against the party preparing

it when there is a question as to its meaning. *Timmerman Bros., Inc. v. Quigley*, 198 Neb. 129, 251 N.W.2d 877 (1977). In that respect a lease is to be construed the same as any other contract. See *Omaha Country Club v. Dworak*, 186 Neb. 336, 183 N.W.2d 264 (1971). In the case at bar the lessors drew the lease and elected to terminate it. The trial court construed the lease and that construction is consistent with the lease as a whole.

Courts in other states have construed similar lease provisions in favor of the lessee. See, *Schuldes v. Wubbolding*, 15 Ariz. App. 527, 489 P.2d 1229 (1971); *Stella v. DePaul Community Health Center*, 642 F.2d 258 (8th Cir. 1981).

In the case now before us a jury was waived. The trial court considered the facts and the law and construed the language of the lease in favor of the lessee. The evidence supports the judgment of the District Court.

AFFIRMED.

KRIVOSHA, C.J., and WHITE, J., concur in result.

BOSLAUGH, J., dissenting.

The provision in the lease which preserved the lessor's action for damages for breach of the lease in the event of termination was not unusual or illegal. See, 49 Am. Jur. 2d *Landlord and Tenant* § 1056 (1970); *Central Trust Co. v. Wolf*, 255 Mich. 8, 237 N.W. 29 (1931); Annot., 99 A.L.R. 42 (1935); Restatement (Second) of Property § 12.1, Comment g (1977). It was not ambiguous and the construction of the lease presented only a question of law.

SAMUEL I. GEORGE, APPELLANT, V. BOARD OF EDUCATION OF SCHOOL DISTRICT NO. 5, CITY OF ORD, NEBRASKA, ET AL., APPELLEES.

313 N.W.2d 259

Filed December 11, 1981. No. 43560.

1. **Legislature: Schools and School Districts.** The Legislature has authorized school districts to acquire buildings or equipment through lease-purchase agreements.
2. **Corporations.** Generally, corporate identity will be disregarded only where the corporation has been used to commit fraud, violate a legal duty, or perpetrate a dishonest or unjust act in contravention of the rights of another.
3. **Legislature: Schools and School Districts.** The Legislature has plenary authority over school districts, limited only by the provisions of the Constitution. This authority extends to the purchase and acquisition of school buildings and facilities.

Appeal from the District Court for Valley County: JAMES R. KELLY, Judge. Affirmed.

Weems & Sikyta, P.C., Law Offices of L. W. Cronk of Counsel for appellant.

Baird, Holm, McEachen, Pedersen, Hamann & Haggart for appellee Ord School Dist. Building Corp.

Stowell & Jensen, P.C., for appellee Board of Education.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and HASTINGS, JJ.

BOSLAUGH, J.

The plaintiff is a resident and taxpayer of School District No. 5 in the city of Ord, Nebraska. He commenced this action to enjoin and prevent the defendant Board of Education of the school district from proceeding with a plan to construct an addition to the high school building of the district which was to be financed through a lease-purchase plan. The petition was later amended to include a prayer for declaratory relief.

After an evidentiary hearing, the trial court dissolved the temporary injunction which had been granted and dismissed the petition. The plaintiff has appealed.

Although the plaintiff has made numerous assignments of error, the controlling issues all relate to the question of whether the defendant was authorized to finance the building addition by the lease-purchase method.

The plaintiff's first contention is that a school district has no power to issue bonds without a vote of the electorate or cause a corporation to be formed to issue bonds. The important fact in this regard is that the defendant district has issued no bonds. It has entered into a contract with the Ord School District Building Corporation, a not-for-profit corporation, in which the district has leased the addition to its building for a term of 5 years. At the end of the term the building is to be donated to the district.

The district is authorized to enter into such a contract by Neb. Rev. Stat. § 79-4,154 (Reissue 1976) which provides as follows: "The governing board of any public school district, area vocational technical college or junior college may enter into a lease or lease-purchase agreement for the exclusive use of their individual jurisdictions for such buildings or equipment as the governing board determines necessary. Such lease or lease-purchase agreements may not exceed a period of five years. All payments pursuant to such leases shall be made from current building funds or general funds."

Under § 79-4,154 there is no restriction as to who the lessor may be under such a contract. To minimize the cost of financing the construction of the building addition, the building corporation was organized, and it issued and sold bonds to provide the necessary financing. Neb. Rev. Stat. § 21-1903 (Reissue 1977) authorizes the organization of corporations for that purpose. It provides as follows: "Corporations may be organized under the provisions of sections 21-1901 to 21-1991 for any lawful purpose or purposes, including, without

being limited to, any one or more of the following purposes: Charitable; benevolent, eleemosynary; educational; civic, patriotic, political; religious; social; fraternal; literary; cultural; athletic; scientific; agricultural; horticultural; animal husbandry; and professional, commercial, industrial, or trade association.

"Corporations may be organized under the provisions of sections 21-1901 to 21-1991 for the purpose of providing for, erecting, owning, leasing, furnishing and managing any building, hall, dormitory or apartments, lands or grounds for the use or benefit in whole or in part of any governmental, religious, social, educational, scientific, fraternal or charitable society or societies, body or bodies, institution or institutions, incorporated or unincorporated, or for the purpose of holding property of any nature in trust for such society, body, or institution or for the purpose of assisting any governmental body in obtaining grants from the federal government, the performance of any requirements necessary to obtain a federal grant or carrying out the purpose for which a federal grant is obtained. Such corporations, as to the ownership and taxation of their property, shall have all the rights, privileges, and exemptions of the body, society or institution for whose use or benefit or for whom in trust said property is held."

The plaintiff contends that the "corporate fiction" should be disregarded and the acts of the building corporation be considered to be the acts of the defendant district. The problem in that regard is that corporate identity is disregarded only where the corporation has been used to commit fraud, violate a legal duty, or perpetrate a dishonest or unjust act in contravention of the rights of another. As a general rule a corporation will be considered to be a legal entity unless it has been "used to defeat public convenience, justify wrong, protect fraud, or defend crime." *Massachusetts Bonding & Ins. Co. v. Master Laboratories*, 143 Neb. 617, 10 N.W.2d 501

(1943). See, also, W. Fletcher, Cyclopedia of the Law of Private Corporations § 41 (rev. perm. ed. 1974). None of these elements are present in this case, and the plaintiff's contention is without merit.

The plaintiff seems to argue that there is some overriding policy which prevents a school district from obligating itself in any way in regard to school buildings and facilities without a vote of the electors. We have said many times that the Legislature has plenary authority over school districts, limited only by the provisions of the Constitution. This authority extends to the purchase and acquisition of school buildings and facilities.

In *Banks v. Board of Education of Chase County*, 202 Neb. 717, 277 N.W.2d 76 (1979), we pointed out there was no constitutional requirement that construction or purchases be financed by district bonds. We said at 721, 277 N.W.2d at 79: "'There has never, so far as the Court could find, been a constitutional restriction requiring construction or purchases by bonded debt.'" The method used by the defendant district in this case has been specifically authorized by the Legislature.

We have examined the other assignments of error and concluded they are without merit.

The judgment of the District Court is affirmed.

AFFIRMED.

WHITE, J., participating on briefs.

CLINTON, J., concurring in the result only.

I concur in the result only. I disagee with the rationale by which the majority reaches the result.

Neb. Rev. Stat. § 21-1903 (Reissue 1977) does not grant power to school districts to organize nonprofit corporations. School districts, like other subdivisions of government, have only the powers granted them by statute and those implicitly necessary to carry out the powers specifically granted. Section 21-1903 simply describes the kinds of corporations which may be organized by those empowered to create them. The

record makes it clear that the corporation was created by persons who were acting on behalf of the school district. It was thus a creation of the school district and its unlawful creation. The corporation issued bonds which the school district was not authorized to issue without approval of the electors.

The school district, however, did have statutory power to enter into a lease-purchase agreement. It did have statutory power to levy the tax to pay for the lease-purchase agreement.

Injunctive relief is a discretionary remedy. In this case, despite the partial illegal form of the transaction, the taxpayers suffered no harm. If there is no harm, then no injunctive or other relief need be granted.

PAWNEE PLASTICS, INC.,
A KANSAS CORPORATION, APPELLANT, V.
AMERICAN SAVINGS COMPANY,
A NEBRASKA CORPORATION, APPELLEE.

313 N.W.2d 262

Filed December 11, 1981. No. 43579.

1. **Contracts.** A provision of a contract is ambiguous when, considered with other pertinent provisions as a whole, it is capable of being understood in more senses than one.
2. **Contracts: Intent.** Where a contract is ambiguous, the court must determine the intent of the parties and the ambiguity must be resolved so as to give effect to that intent.
3. **Judgments: Appeal and Error.** The judgment of the trial court in an action at law where a jury has been waived has the effect of a verdict of a jury and it will not be set aside unless clearly wrong.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Affirmed.

Thomas Blount of Garber & Batt for appellant.

James B. Cavanagh of Erickson, Sederstrom, Leigh, Eisenstatt, Johnson, Kinnamon, Koukol & Fortune, P.C., for appellee.

Heard before BOSLAUGH, MCCOWN, and CLINTON, JJ., and SPENCER, Retired Justice, and BLUE, District Judge.

BLUE, District Judge.

The plaintiff, Pawnee Plastics, Inc., filed an action against the defendant, American Savings Company, based on an alleged guarantee of payment for material supplied by plaintiff to Whitewater Marine Products, Inc. This alleged guarantee appeared in a letter from Wm. C. Ramsey, president of defendant company, which is as follows:

"February 19, 1975

Mr. Larry R. Nelson, Treasurer
Pawnee Plastics, Inc.
1444 South Tyler Road
Wichita, Kansas 67209

Dear Mr. Nelson:

This will confirm our telephone conversation of the past few days in which we advised you that American Savings Company will guarantee payment of your invoices to Whitewater Marine Products, Inc. as they come due.

We would like to limit our guarantee to payment of specific invoices issued, following shipment of material ordered on specific purchase orders of Whitewater Marine Products, Inc.

I believe the particular purchase order with which you are concerned at the moment is Whitewater Purchase Order #5022 dated January 29, 1975 which is included in the guarantee.

Very truly yours,
/s/ W. C. Ramsey
Wm. C. Ramsey
President

WCR:kw"

At the time the letter was written, Whitewater Marine Products, Inc., was a wholly-owned subsidiary of American Savings Company and Ramsey was presi-

dent of both of these corporations.

The trial court found that the language of the letter was ambiguous and allowed parol evidence to be introduced explaining the provisions of this instrument.

In a trial in which a jury was waived, the court determined that the guarantee only applied to payment of those invoices that were specifically approved by defendant. The court found that the specific invoices for material involved herein were not approved as required and entered a judgment for defendant. The motion for new trial was overruled and plaintiff appeals.

The threshold question is whether the terms of the letter which is relied upon by plaintiff are ambiguous or not, as a written instrument is only open to construction if it is ambiguous or, in a proper case, if there is fraud or mistake. *Olds v. Jamison*, 195 Neb. 388, 238 N.W.2d 459 (1976).

A provision of a contract is ambiguous when, considered with other pertinent provisions as a whole, it is capable of being understood in more senses than one. *Frank McGill, Inc. v. Nucor Corp.*, 195 Neb. 448, 238 N.W.2d 894 (1976).

If the first paragraph of the letter were the entire body of the agreement, then the plaintiff would be correct that an unconditional guarantee existed. However, the second paragraph limits the guarantee. It states: "We would like to limit our guarantee to payment of specific invoices issued, following shipment of material ordered on specific purchase orders of Whitewater Marine Products, Inc."

The above paragraph refers to specific invoices and specific purchase orders. However, this paragraph does not further define to what specific invoices and specific orders the paragraph refers. Plaintiff construes the letter as if the second paragraph were not present, or at least as if the word "specific" were not present. "Specific," according to Black's Law Dictionary 1571 (4th ed. 1957), means: "Precisely formu-

lated or restricted; definite; explicit; of an exact or particular nature. People v. Thomas, 25 Cal. 2d 880, 156 P.2d 7, 17. Having a certain form or designation; observing a certain form; particular; precise; tending to specify, or to make particular, definite, limited or precise. Republic Casualty Co. v. Scandinavian-American Bank, D.C. Wash., 2 F.2d 113, 114; Western Union Telegraph Co. v. South & N. A. R. Co., 184 Ala. 66, 62 So. 788, 793."

It appears that defendant intended to impose a limitation on its guarantee. However, the language is vague and ambiguous as to the exact nature of the limitation and therefore requires explanation. The trial court was correct in receiving evidence explaining the guarantee.

Where a contract is ambiguous, the court must determine the intent of the parties and the ambiguity must be resolved so as to give effect to that intent. *Knight Bros., Inc. v. State*, 189 Neb. 64, 199 N.W.2d 720 (1972); *Lovelace v. Stern*, 207 Neb. 174, 297 N.W.2d 160 (1980).

From the evidence which was received, the trial court concluded that under the guarantee defendant was not obligated to make payments for the material involved until each transaction received the prior approval of defendant. The court further found that plaintiff had failed to receive such approval.

This case was tried to the court without a jury. Under such circumstances the judgment has the effect of a verdict of a jury and will not be set aside unless clearly wrong. *American Standard Ins. Co. v. Tournor*, 186 Neb. 585, 185 N.W.2d 267 (1971); *Dale Electronics, Inc. v. Federal Ins. Co.*, 205 Neb. 115, 286 N.W.2d 437 (1979).

The decision of the trial court is not clearly wrong but is amply supported by the evidence. The judgment is affirmed.

AFFIRMED.

IN RE ESTATE OF LAURA BERNSTRAUCH, DECEASED. SHRINERS HOSPITALS FOR CRIPPLED CHILDREN, APPELLANT, V. GRAND LODGE OF THE ANCIENT, FREE AND ACCEPTED MASONS OF NEBRASKA, APPELLEE.

313 N.W.2d 264

Filed December 11, 1981. No. 43586.

1. **Wills.** A latent ambiguity exists in a will when a beneficiary is erroneously described, where no such beneficiary has ever existed as so described, or when two or more persons or organizations answer the description imperfectly.
2. **Wills: Evidence.** Extrinsic evidence is admissible both to disclose and to remove a latent ambiguity.
3. **Wills.** No charitable or benevolent bequest or devise which is otherwise valid shall be invalid by reason of the indefiniteness or uncertainty of the persons designated as beneficiaries. Neb. Rev. Stat. § 30-239 (Reissue 1979). This section is the statutory expression of the doctrine of *cy-pres* applicable to wills.
4. ——. The doctrine of *cy-pres* is applicable when the devise or bequest in question has an apparent dominant charitable intent and there is in existence an identifiable beneficiary whose charitable intent and purpose is reasonably close to the intent and purpose expressed by the testatrix.

Appeal from the District Court for Furnas County: BERNARD SPRAGUE, Judge. Reversed and remanded with directions.

David B. Smith and Steven H. Heldt of Smith & Smith for appellant.

Eisenhart & Eisenhart for appellee.

William H. Sherwood, pro se, amicus curiae.

Heard before KRIVOSHA, C.J., MCCOWN, CLINTON, and WHITE, JJ., and RIST, District Judge.

RIST, District Judge.

This is an appeal from a judgment and decree of the District Court of Furnas County, Nebraska, construing a portion of the last will and testament of Laura Bernstrauch, deceased.

Miss Bernstrauch died September 17, 1978, in

Oxford, Nebraska, and her last will and testament was admitted to probate in the county court of Furnas County, Nebraska, on October 23, 1978. Her will contained the following provision: "FIFTH [CHARITABLE DEVISE OF LAND] I give, devise and bequeath unto the Masonic Lodge for Crippled Children, and for that sole and only use, title to pass to said Lodge in accordance with the instructions of the Lodge, and if the Lodge is unable, because of any rule of law, or the charter or by-laws of the Lodge, to own land, then the following described land is to be sold, and the proceeds thereof to be given by my Executor to said Lodge for such purpose, the following described premises, to-wit:" (then follows a legal description of real estate).

On November 8, 1978, the personal representative of her estate filed his application in the county court for construction of the will, praying that as to the above provision the court determine the intended devisee of the property. With respect to said application, the Grand Lodge of the Ancient, Free and Accepted Masons of Nebraska (hereinafter called Grand Lodge) entered its appearance and moved for a determination that it was the proper devisee under such provision. Also appearing and moving to be determined the devisee was Shriners Hospitals for Crippled Children (hereinafter called Shriners Hospitals).

On January 23, 1979, the county court entered its judgment that the Grand Lodge was the beneficiary named in said provision, from which determination Shriners Hospitals appealed to the District Court. That court, on January 11, 1980, entered its judgment that Shriners Hospitals was the proper devisee, but, upon motion for new trial filed by the Grand Lodge, a new trial was granted. Following such trial the court, on May 2, 1980, entered a judgment determining the Grand Lodge to be the devisee for the purpose set forth in the will. Shriners Hospitals perfected its appeal to this court.

The record reflects that decedent was a single woman who was physically crippled at the time of the execution of the will and had been so crippled for some time prior thereto. She was a recluse, and did not participate in church, community, or social activities. She was not a member of any Masonic organization, and the record reflects no particular knowledge on her part of any such organizations or their purposes and functions.

Grand Lodge, appellee herein, is a Nebraska corporation and the highest ranking Masonic organization in the State of Nebraska. It has subordinate lodges in many communities of the state, including the communities of Stanton and Oxford, Nebraska, where decedent had resided during her lifetime. Its stated purposes are "charitable, benevolent, educational, and for the service of God . . . ."

The Grand Lodge, as such, has no programs for children, but there are appendant Masonic organizations which do in various ways. One is the Masonic-Eastern Star Home for Children (hereinafter called Home for Children), a Nebraska corporation, with its location in Fremont, Nebraska. Its stated purpose is "to aid, care for, maintain and educate children of Freemasons and of members of the Order of the Eastern Star [another appendant Masonic organization] and, when feasible, to likewise assist, maintain and educate other dependent children under such conditions as the Board of Trustees may provide." It has no stated program for crippled children, although there is evidence that some children in the home have been so afflicted. The Home for Children is financed jointly by the Grand Lodge and by the Grand Chapter of the Order of the Eastern Star.

Another appendant Masonic organization is the Ancient Arabic Order of the Nobles of the Mystic Shrine [hereinafter called Shrine], which has several temples or subordinate groups in Nebraska. The Shrine is national in scope and has separately incorporated as another appendent Masonic organization Shriners

Hospitals for Crippled Children (Shriners Hospitals), a Colorado corporation, appellant herein, which operates, nationwide, 18 orthopedic hospitals and three burn centers, all for children. The stated purpose of Shriners Hospitals is "to construct, maintain, and operate, hospitals and other eleemosynary institutions for the treatment of curable crippled children, wholly free of charge to said children, parents or guardians, and without regard to race, color, creed, sex, or sect . . . ." There is no requirement that the parents or guardians be members of any Masonic organization.

All appendant Masonic organizations require their members to be Masons, although being a Mason does not automatically confer membership in such appendant organizations.

There is no Masonic organization, appendant or otherwise, formally known as "Masonic Lodge" or "Masonic Lodge for Crippled Children."

The first question to be resolved is whether a latent ambiguity exists with respect to the name of the devisee designated in the paragraph of the will at issue. Shriners Hospitals says there is.

Grand Lodge claims no such ambiguity exists, asserting that the words "Masonic Lodge," as used in the will, describes the Grand Lodge; that the Grand Lodge is so known; and that the subsequent words "for Crippled Children" are only descriptive of purpose and are not part of devisee's name.

Grand Lodge's claim is not sustained by the record. Testatrix was not a member of any Masonic organization and had no demonstrated knowledge of Masonic terminology. There are a number of different organizations that are a part of or appendant to Masonry. The evidence does not show any general recognition by either Masons or non-Masons that the Grand Lodge is the only Masonic entity known as "Masonic Lodge," nor any such recognition by testatrix. The same is true of the name "Masonic Lodge for Crippled Children." Finally, we have the fact, already noted, that there is

no Masonic organization formally known by either of these designations. There is no reasonable basis for concluding from the name itself that testatrix was referring to the Grand Lodge.

We conclude, therefore, that Shriners Hospitals is correct and that a latent ambiguity exists. A latent ambiguity arises when a beneficiary is erroneously described or where no such beneficiary has ever existed as the one so described, *Burnham v. Bennison*, 126 Neb. 312, 253 N.W. 88 (1934), or when two or more persons or organizations answer the description imperfectly, *Estate of Bletsch*, 25 Wis. 2d 40, 130 N.W.2d 275 (1964). The authorities just cited also hold that extrinsic evidence is admissible both to disclose and to remove the latent ambiguity of the will.

We turn next to the question of whether an examination of the will and the extrinsic evidence in this case can resolve the ambiguity and whether the doctrine of *cy-pres* is appropriate to such resolution.

We note the devise here involved, by any reasonable reading, is to benefit crippled children. Being a devise for a charitable or benevolent purpose, it is viewed with favor by the courts, and, pursuant to statute, it should not be held invalid by reason of uncertainty of the designation of the beneficiary if it be otherwise valid. Neb. Rev. Stat. § 30-239 (Reissue 1979). This is the statutory expression of the *cy-pres* doctrine applicable to wills. *Wood v. Lincoln General Hospital Assn.*, 205 Neb. 576, 288 N.W.2d 735 (1980). Such doctrine is that a charitable gift will not be permitted to fail because of any mistake or ambiguity in describing the intended beneficiary or expressing its purpose if, from the language of the devise, when construed in the light of all the facts, the intent of the testatrix is reasonably apparent. *Wood v. Lincoln General Hospital Assn., supra; Garwood v. Drake University*, 188 Neb. 605, 198 N.W.2d 336 (1972). A dominant charitable intent is a precondition to the judicial exercise of such doctrine and there must be in existence an identifiable bene-

ficiary whose charitable or benevolent programs and goals are reasonably close to those apparent in testatrix' expression of purpose. *Estate of Bletsch, supra; Garwood v. Drake University, supra.*

As previously stated, we conclude, from the language of the will and in light of the crippled condition of testatrix, there is a clear expression of a purpose: to aid and assist crippled children. It is also clear that testatrix desired this purpose to be carried out by some Masonic organization or association. A consideration of such organizations before the court shows that while the Grand Lodge has a general purpose of charitable or benevolent intent, it has no stated program dealing expressly with crippled children. The Home for Children in Fremont, which the Grand Lodge at least tacitly suggests is the organization to which it would devote the devise, is primarily for the care and maintenance of children of Masons or of Members of the Eastern Star, and any care with respect to crippled children is incidental at best.

Shriners Hospitals, on the other hand, is specifically organized and operated for crippled children, without regard to race, color, creed, sex, or sect, and with no requirement that the parents or guardians of the child have a Masonic affiliation or membership. It is an appendant Masonic organization.

We conclude, therefore, that Shriners Hospitals maintains facilities and programs that are precisely within the dominant purpose expressed by the testatrix. We also note that since testatrix had no Masonic affiliation during her lifetime, it is reasonable to conclude she would want aid and assistance to be offered crippled children without regard to any Masonic affiliation of their parents or guardians. Certainly there is no intent expressed in the will that such affiliation ought to be a condition of such aid and assistance. We therefore find and determine that Shriners Hospitals is the most appropriate organization to be designated as devisee under the provisions of decedent's will here involved.

Accordingly, we reverse the judgment of the District Court and remand the cause for the entry of judgment that Shriners Hospitals for Crippled Children be determined and designated as the devisee under paragraph FIFTH of decedent's will, and for such other and further order as shall be necessary to the county court of Furnas County, Nebraska, for the completion of the administration of decedent's estate in accordance with such judgment.

REVERSED AND REMANDED WITH DIRECTIONS.

DIZCO, INC., A CORPORATION, APPELLANT, V. GENEVIEVE KENTON, APPELLEE.

313 N.W.2d 268

Filed December 11, 1981. No. 43613.

1. **Highways: Negligence: Livestock.** An owner must exercise ordinary care to confine his cattle to prevent them from being unattended upon a public highway, and if the owner knows or, in the exercise of ordinary diligence, should know that any of his cattle are unattended upon a highway, it is his duty to exercise ordinary care to round them up and confine them.
2. **Negligence: Juries.** Where reasonable minds may draw different conclusions as to whether or not acts of negligence charged have been proved, the case must be submitted to the jury for decision.

Appeal from the District Court for Thomas County: KEITH WINDRUM, Judge. Affirmed.

Kelley, Wallace, Scritsmier, Moore, Romatzke & Byrne, P.C., and Royce E. Norman for appellant.

William S. Dill of Quigley, Dill & Quigley for appellee.

Heard before KRIVOSHA, C.J., WHITE, and HASTINGS, JJ., and RIST and CAPORALE, District Judges.

RIST, District Judge.

This case involves a collision on U.S. Highway 83

northeast of Thedford, Nebraska, between a truck tractor owned by plaintiff and a horse owned by defendant. The accident occurred March 21, 1978, at approximately 2 a.m., as the truck, hauling United States mail, was proceeding south on the highway. Plaintiff sought to recover the damages to its vehicle and the rental value of replacement equipment during repair. Defendant counterclaimed for the loss of her horse. The case was tried to a jury, resulting in a verdict of no recovery by either party. Plaintiff appeals to this court.

Plaintiff's principal assignments of error are the failure of the trial court to properly instruct the jury on defendant's duty to confine her livestock and in submitting the issue of plaintiff's contributory negligence to the jury.

With respect to defendant's duty to confine livestock, plaintiff submitted the following instruction: "The owner of livestock has a duty to exercise a high degree of care to confine them to prevent them from being unattended upon a public arterial highway. If the owner knows or, in the exercise of ordinary care, should know that any of her livestock are unattended upon a public arterial highway, it is her duty to exercise a high degree of care to round them up and confine them."

The trial court refused this instruction and gave the following instruction to the jury: "The owner of domestic animals has the duty to exercise ordinary care to confine his livestock to prevent them from being unattended upon the public highway. The principal test is whether or not he should reasonably have foreseen that any of his livestock would be upon the highway and the occurrence of such an accident; and if the owner knows, or in the exercise of ordinary diligence, should have known that any of his livestock were unattended upon the highway, it is his duty to exercise ordinary care to round them up and confine them."

The instruction of the trial court was correct. The duty of ordinary care in such situations is well established in Nebraska. *Traill v. Ostermeier*, 140 Neb. 432, 300 N.W. 375 (1941); *Countryman v. Ronspies*, 180 Neb. 76, 141 N.W.2d 425 (1966). The higher duty sought by plaintiff is not the law of this state, and we decline to make it so.

With respect to the issue of plaintiff's contributory negligence, the trial court submitted to the jury the following allegations respecting plaintiff's driver: failure to keep a proper lookout; failure to exercise reasonable control; and excessive speed. A brief summary of the evidence is in order.

The record reflects a hard-topped two-lane highway with a gradual slope downward from the north of approximately a quarter of a mile to the point of collision. The highway was clear, although there was snow in the pastures and fence areas. No condition existed restricting visibility other than darkness. The driver testified to a speed of 55 to 56 miles per hour at the time of the accident. He was familiar with the road and with the fact that deer sometimes appeared on the highway in this area. Just before the accident he saw a white horse on the left side of the road and then a dark horse on the highway, which he struck. He did not apply his brakes either before or after the collision. The horse was killed, and the body found approximately 189 feet south of the point of collision. The left front of the truck tractor was substantially damaged.

The above evidence warranted the submission to the jury of the allegations of contributory negligence noted above. Where reasonable minds may draw different conclusions as to whether or not acts of negligence charged have been proved, the case must be submitted to the jury for decision. *Countryman v. Ronspies*, *supra*.

It follows from what we have said that the trial court was also correct in overruling plaintiff's motion for

directed verdict on liability and damages and plaintiff's motion for judgment notwithstanding the verdict.

Accordingly, the judgment of the trial court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LARRY W. SCHNECKLOTH, JOHN L. KOGER, AND NOEL J. HEATHMAN, APPELLANTS.

313 N.W.2d 438

Filed December 11, 1981. Nos. 43712, 43713, 43714.

1. **Criminal Law: Statutes.** In Nebraska, all crimes are statutory and no act is criminal unless the Legislature has in express terms declared it to be so.
2. **Statutes.** Where the language of a statute is plain and unambiguous, no interpretation is needed, and the court is without authority to change the language.
3. **Kidnapping: Penalties.** Neb. Rev. Stat. § 28-313 (Reissue 1979), the Nebraska kidnapping statute, creates only a single criminal offense and not two separate offenses, even though it is punishable by two different ranges of penalties depending on the treatment accorded the victim.
4. _____: _____. The factors which determine which of the two penalties is to be imposed are not elements of the offense of kidnapping, but are simply mitigating factors which may reduce the sentence of those charged under Neb. Rev. Stat. § 28-313(1) (Reissue 1979), and their existence or nonexistence should properly be determined by the trial judge.
5. **Indictments and Informations.** An information must inform the accused of each fact that is an essential element of the crime intended to be charged.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Bennett G. Hornstein for appellants.

Paul L. Douglas, Attorney General, and John Boehm for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

BRODKEY, J.

The three separate cases involved in this appeal were consolidated for trial below and have also been consolidated for briefing and argument in this court. The defendants below, Larry W. Schneckloth, John L. Koger, and Noel J. Heathman, were each charged in informations containing three counts with committing the offenses of kidnapping, in violation of Neb. Rev. Stat. § 28-313(1) (Reissue 1979); first degree sexual assault, in violation of Neb. Rev. Stat. § 28-319(1) (Reissue 1979); and using a firearm to commit a felony, in violation of Neb. Rev. Stat. § 28-1205(1) (Reissue 1979). Trial was had to a jury which found all the defendants guilty as charged. The court sentenced all three defendants to terms of life imprisonment for kidnapping, concurrent terms of 8 to 10 years' imprisonment for first degree sexual assault, and consecutive terms of from 3 to 5 years' imprisonment for use of a firearm in the commission of a felony. The defendants were allowed credit for the time each had spent in confinement prior to sentencing. We affirm.

Without going into great detail with reference to the background facts of this case, the record supports the conclusion that the victim was employed as a cashier at the 7-Eleven Store located at 41st and Dodge Streets in Omaha and was working alone during the late evening hours of February 26, 1980, and early morning hours of February 27, 1980. Shortly after 3 a.m. on February 27, 1980, a dark-colored station wagon, occupied by the three defendants, entered into the store parking lot and was parked near the gasoline pumps. According to the victim's testimony, she was abducted at gunpoint by the three defendants, who forced her into the automobile and thereafter sexually assaulted her against her will by performing various types of sex acts upon her during the trip through various sections of the city of Omaha, and over into a park in Council Bluffs, Iowa. In committing the various sexual acts upon her the defendants from

time to time changed their seats and locations in the automobile. Following the foregoing sexual activity, the defendants ordered the victim to get dressed and lie on the back seat. Heathman, who was seated in the back seat, pointed a gun at her when the vehicle was stopped by a police cruiser. She was informed by the defendants that they belonged to a motorcycle group and that if she complained to the police she would be killed. She was subsequently rescued by the Council Bluffs policeman who removed her to one of the police cruisers, at which time she told the police that she had been abducted at gunpoint from the store, sexually molested by the occupants of the car, and threatened with death if she told anyone about the incident. The defendants were then arrested by the police and identified. A further search of the automobile revealed a .38-caliber Smith & Wesson 4-inch-barrel revolver hidden in the springs under the rear seat of the vehicle. The victim was taken to the Council Bluffs Mercy Hospital where physicians at the hospital examined her and conducted laboratory tests on smears obtained from her vaginal and rectal areas. These tests disclosed spermatozoa and high vaginal acid phosphatase, indicating recent sexual intercourse.

The story and testimony on behalf of defendants was different than that given by the victim. The only witnesses testifying for the defendants were the defendants Koger and Heathman. Schneckloth did not testify at the trial. Both Koger and Heathman admitted their presence in Koger's automobile and their sexual activity with the victim during the hours testified to by her. Both, however, denied any forcible abduction of her from the 7-Eleven Store, and contended that the victim had voluntarily consented to have sexual activity with them. They admitted possessing the revolver found in the automobile, but explained that they had used it for target practice during the afternoon of February 26, 1980.

The State then called as a rebuttal witness one

Diane Johnson, who was a security officer employed by Rosen-Novak automobile company. She testified that she was on her patrol route of the Rosen-Novak properties at approximately 2:45 a.m. on February 27, 1980, and she was followed by a station wagon containing three men, which chased her vehicle. The men shouted obscenities, and one of them pointed a gun at her. At one time the station wagon blocked her exit from an alleyway; however, she then called the Omaha police emergency number on her mobile telephone and a short time later the station wagon left the scene. She subsequently indentified the vehicle as bearing the license plate number of defendant Koger's station wagon.

Appellants' sole assignment of error as set out in their brief on appeal is as follows: "The District Court's sentencing of each of the defendants to life imprisonment for kidnapping, rather than the lesser alternative penalty of one-to-fifty years, based only on the Court's own fact findings of the statutory elements required for such higher penalty, violated the defendant's [sic] constitutional and other rights to have the State's informations allege the essential statutory elements required for imposition of the higher penalty, to be informed of the nature and cause of the accusation against them, and to a jury's determination of their guilt by proof beyond a reasonable doubt." In short, appellants contend that § 28-313 defines two separate kidnapping offenses, rather than one offense with two separate penalty provisions; that the information filed by the State against them in these cases failed to allege the essential statutory elements required for the imposition of the higher penalty; and that the District Court erred in sentencing them to life imprisonment on the kidnapping counts rather than the lesser penalty of 1 to 50 years' imprisonment. It is to be noted, however, that the appellants have not appealed from their convictions or sentences pertaining to the sexual assault and use of firearm in the com-

mission of a felony charges.

We commence our discussion with the observation that in Nebraska all crimes are statutory, and no act is criminal unless the Legislature has in express terms declared it to be so. *State v. Gallegos*, 193 Neb. 651, 228 N.W.2d 615 (1975); *State v. Ewert*, 194 Neb. 203, 230 N.W.2d 609 (1975); *State v. Hauck*, 190 Neb. 534, 209 N.W.2d 580 (1973). It is also a fundamental principle of statutory construction that a penal statute is to be strictly construed. *State v. Suhr*, 207 Neb. 553, 300 N.W.2d 25 (1980); *State v. Simants*, 182 Neb. 491, 155 N.W.2d 788 (1968). We have also held: "'Where the language of a statute is plain and unambiguous, no interpretation is needed and the court is without authority to change the language.'" *State v. Suhr*, *supra* at 560, 300 N.W.2d at 29. See, also, *State v. Gallegos*, *supra*. The kidnapping statute involved in this appeal is § 28-313, which became effective January 1, 1979. That statute provides as follows:

"Kidnapping; *penalties.* (1) A person commits kidnapping if he abducts another or, having abducted another, continues to restrain him with intent to do the following:

(a) Hold him for ransom or reward; or

(b) Use him as a shield or hostage; or

(c) Terrorize him or a third person; or

(d) *Commit a felony;* or

(e) Interfere with the performance of any government or political function.

(2) *Except as provided in subsection (3) of this section, kidnapping is a Class IA felony.*

(3) If the person kidnapped was *voluntarily released* or liberated *alive by the abductor* and in a safe place *without having suffered serious bodily injury,* prior to trial, kidnapping is a Class II felony." (Emphasis supplied.)

In support of their theory that § 28-313 defines two separate kidnapping offenses, rather than one offense with differing penalties, the appellants contend

that to prove Class IA kidnapping, so as to subject them to the punishment of life imprisonment, the State must prove not only the abduction or restraint for one of the purposes designated in the statute but also that the kidnapped person was *not* voluntarily released or liberated alive by the abductor *and* in a safe place without having suffered serious bodily injury prior to trial. They contend that the informations filed against them in these cases were defective inasmuch as they contain no language whatsoever with reference to the victim being released or liberated alive in a safe place without having suffered serious bodily injury prior to trial, and that these are essential elements of the crime of kidnapping in this state which must be specifically alleged. They deny that these are merely mitigating factors in the determination of which penalty should be imposed under the particular facts of the case.

Although § 28-313, so far as we have been able to ascertain, has not been interpreted by prior decisions of this court, we are unable to accept appellants' arguments and characterization of the Nebraska kidnapping statute. The factors listed in subsection (3) are not elements of the offense of kidnapping, but are simply mitigating factors which may reduce the sentence of those charged under § 28-313(1) if they are applicable. While there is some authority from other jurisdictions supporting the position of the appellants, a review of the case law convinces us that the cases supporting the view taken by the appellee, the State of Nebraska, in this case not only represent the weight of authority in the country but also are supported by the better reasoning.

In support of their position, the appellants rely principally upon the cases of *State v. Goodwin*, 118 N.H. 862, 395 A.2d 1234 (1978), and *State v. Sewell*, 342 So. 2d 156 (La. 1977). It is true that in *State v. Goodwin, supra*, the court did state the rule to be that in determining whether a felonious sexual assault

victim has suffered sufficient serious bodily injury to make accompanying kidnapping a Class A felony, the seriousness of the injury must be presented to the jury, as would evidence of any other element of crime. In its opinion the court stated at 869, 395 A.2d at 1238: "Although the jury was not instructed on the elements of felony A kidnapping, the judge decided on his own at the time of sentencing that the evidence supported a conviction for felony A kidnapping. This fact-finding was improper; it invaded the domain of the jury." This case does, in fact, appear to support the arguments and contentions of the appellants in this case, as does also the subsequent case from the same jurisdiction, *State v. Champagne*, 119 N.H. 118, 399 A.2d 287 (1979). Also in support of their contentions in this regard, the appellants cite the case of *State v. Sewell*, *supra*, which, however, involved an "aggravated kidnapping" statute. In that case the court stated that the aggravated kidnapping statute defines two separate offenses consisting of a capital offense in which the kidnapped person is not liberated unharmed before sentencing, and a noncapital offense in which the sentence of death cannot be given but an offender must be sentenced to life imprisonment at hard labor when the kidnapped person is liberated unharmed prior to sentencing. Our review of *Sewell* convinces us that the two cases are distinguishable, and that the Louisiana statute clearly defines two separate offenses while the Nebraska statute does not. Under the Louisiana statute, specifically designated as an "aggravated kidnapping" statute, it is only required, to invoke the lesser penalty under that statute, that the kidnapping victim be "liberated unharmed." Under the Nebraska statute, however, it is required that the "abductors" have voluntarily released or liberated alive the kidnapping victim before the lesser penalty can be invoked. In this case the evidence clearly establishes that the victim was rescued from the appellants by the police officers after they had stopped

the defendant Koger's vehicle, and she was not released by action of the "abductors." In addition, she was subjected to repeated first degree sexual assaults, which acts are generally held to be sufficient to constitute "serious bodily injury." See Annot., What Is "Harm" Within Provisions of Statutes Increasing Penalty for Kidnapping Where Victim Suffers Harm, 11 A.L.R.3d 1053 (1967).

On the contrary, the position contended for by the appellee is supported by the U.S. Supreme Court in its opinion in *Smith v. United States*, 360 U.S. 1, 79 S. Ct. 991, 3 L. Ed. 2d 1041 (1959). In that case, the U.S. Supreme Court determined that the Federal Kidnapping Act, 18 U.S.C. § 1201 (1959), created the single offense of transporting a kidnapping victim across state lines. The statute under which the petitioner was convicted provided in part: "(a) Whoever knowingly transports in interstate . . . commerce, any person who has been unlawfully . . . kidnapped . . . shall be punished (1) by death if the kidnapped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed."

In its opinion, the Supreme Court stated at 360 U.S. 7-8: "It has been held by two Courts of Appeals that indictments similar in terms to the charge here were sufficient to support capital punishments despite the absence of allegations that the kidnapping victims were released harmed. *United States v. Parrino*, 180 F.2d 613, *Robinson v. United States*, 114 F.2d 392. Cf. *United States v. Parker*, 103 F.2d 857. Petitioner contends that these holdings dispose of his case because they make clear that the statute creates a single offense of kidnapping which *may* be punished by death if the prosecution, at trial, shows that the victim was released in a harmed condition. The Government claims, however, that whether a specific kidnapping constitutes a capital offense requires

examination of the evidence to determine whether the victim was released harmed or unharmed; in other words, that the statute creates two offenses: kidnapping without harm, which is punishable by a term of years, and kidnapping with harm, which is punishable by death. Further, the Government contends that the mere filing of an information by the United States Attorney eliminated the capital element of the crime.

"The Courts of Appeals which have been concerned with the statute have uniformly construed it to create the single offense of transporting a kidnapping victim across state lines. We agree with this construction. Under the statute, that offense is punishable by death if certain proof is introduced at trial. When an accused is charged, as here, with transporting a kidnapping victim across state lines, he is charged and will be tried for an offense which *may* be punished by death. Although the imposition of that penalty will depend on whether sufficient proof of harm is introduced during the trial, that circumstance does not alter the fact that the offense itself is one which *may* be punished by death and thus must be prosecuted by indictment. In other words, when the offense as charged is sufficiently broad to justify a capital verdict, the trial must proceed on that basis, even though the evidence later establishes that such a verdict cannot be sustained because the victim was released unharmed. It is neither procedurally correct nor practical to await the conclusion of the evidence to determine whether the accused is being prosecuted for a capital offense."

In *Robinson v. United States*, 144 F.2d 392 (6th Cir. 1944), the Court of Appeals held that the allegation in the indictment that the defendant did not liberate the victim unharmed was not an essential part of the offense charged, rather, that it merely furnished the basis for proof of the extent to which the offense was aggravated. "We again point out that the phrase 'and did not liberate her unharmed' did not state an

essential part of the offense charged. Appellant might have been convicted without any showing that Mrs. Stoll was liberated at all; or, if she was, whether she was set free either sound or unsound, in mind or body. The punishment provided by the statute varied from imprisonment from one year to life, in the discretion of the court, or to a death sentence 'if the verdict of the jury should so recommend,' and in determining whether it would recommend capital punishment, the jury was entitled to know from the evidence to what extent aggravation was involved. It was for this reason, no doubt, that the phrase 'provided that the sentence of death shall not be imposed by the court if, prior to its imposition, the kidnaped person has been liberated unharmed' was incorporated in both the statute and the indictment. It furnishes a basis for proof as to what extent the offense was aggravated." 144 F.2d at 397.

In *Pyles v. Boles*, 148 W. Va. 465, 135 S.E.2d 692 (1964), the Supreme Court of Appeals held that the West Virginia statute which defines the offense of kidnapping created a single capital offense and not three separate offenses, even though it provided for varying punishment depending on the treatment accorded the victim. The court held that an indictment which charged kidnapping was sufficient, although no reference was made therein to the punishment sought or to the treatment accorded the victim. "It is significant that the provisions of the statute of this State dealing with punishments of not less than twenty years and not less than ten years state that 'in all cases where the person against whom *the offense* is committed is returned, or is permitted to return, alive, without serious bodily harm having been inflicted upon him,' the punishment shall be for those respective periods of not less than twenty and ten years. This language indicates clearly that the Legislature, in enacting the kidnapping statute, intended to create and did create one single offense with different punish-

ments dependent upon and determined by the manner in which it is committed and that the statute did not create two or more separate and distinct offenses. . . .

. . . .

"The provisions of the statute relating to the various punishments to be imposed upon a person convicted of the offense of kidnapping and which punishments depend upon and are governed by the evidence introduced at the trial, do not state or prescribe any element of the offense created by the statute." 148 W. Va. at 476-79, 135 S.E.2d at 699-701.

We concur with the statements of the West Virginia Supreme Court, and note that the Nebraska statute is similar in its operation in that it establishes the offense of kidnapping in subsection (1) by listing the elements of the offense. Subsection (2) sets forth that the basic penalty for kidnapping is life imprisonment, but subsection (3) provides that in the event of certain mitigating factors the sentence may be reduced to a term of years, ranging from a minimum imprisonment of 1 year to a maximum of 50 years. In this regard, we note that all felonies in Nebraska have been divided into six classes by the new Nebraska Criminal Code (Neb. Rev. Stat. § 28-105 (Reissue 1979)), and that such classification of felonies has been made for the purpose of providing penalty guidelines which may be imposed upon conviction of a given offense.

One of the best general discussions of the issues presented to us in this appeal is found in the recent case of *State v. Williams*, 295 N.C. 655, 249 S.E.2d 709 (1978), and we quote rather fully from certain pertinent portions of that opinion. In *Williams* the Supreme Court of North Carolina discussed at some length that state's kidnapping statute, which to all intents and purposes is very similar to that of Nebraska's. In *Williams* the court held that the existence of two different ranges of sentences under their kidnapping statute (N.C. Gen. Stat. § 14-39(a)(b)

(Cum. Supp. 1979)) should not be read as creating two separate offenses of simple kidnapping and aggravated kidnapping; that the kidnapping statute, by its terms, presupposes a conviction for kidnapping, the elements of which are set forth therein; that it does not purport to add or subtract elements of the offense, but, rather, speaks merely to matters which may be shown in mitigation of punishment. In its opinion, the court stated as follows at 667-74, 249 S.E.2d at 717-22:

"Different policy considerations are involved in G.S. 14-39. It follows the pattern of the kidnapping provision, § 212.1, of the Model Penal Code, which contains a qualifying provision providing for reduced punishment in kidnapping cases if the victim is 'released alive in a safe place prior to trial.' The drafters of the Model Penal Code stated that the purpose of this provision is to 'maximize the kidnapper's incentive to return the victim alive.' Model Penal Code, Tentative Draft No. 11, § 212.1, at 19 (1960). It is reasonable to assume that the General Assembly had a similar purpose in providing reduced punishment under G.S. 14-39(b) when the victim has been released in a safe place and has not been sexually assaulted or seriously injured. Unlike 18 U.S.C. §§ 2113(d) and 924(c), which seek to deter the introduction of a dangerous element in the commission of felonies, G.S. 14-39(b) seeks to reduce the possibility of harm to a victim who is in an already dangerous situation. In other words, it is intended to offer a kidnapper the inducement of a lesser sentence if he refrains from injuring or permitting injury to his victim.

"This purpose points to the key distinction between G.S. 14-39(b) and a statute like 18 U.S.C. § 2113(d). Rather than being sentence-enhancing, the factors set forth in G.S. 14-39(b) are sentence-reducing in nature. In subsection (a) of the statute, the General Assembly defines the crime of kidnapping. In the first sentence of subsection (b), it provides the punishment for *this* crime as imprisonment for not less than 25 years nor

more than life. It then lists various factors, the presence of which will result in a reduced sentence.

"The General Assembly has determined that kidnapping is a serious crime and has set punishment at a term of imprisonment of not less than 25 years nor more than life. Out of concern for the safety of kidnapping victims, however, the General Assembly has set forth certain factors that can result in mitigation of sentence. If a defendant can show that the victim of the crime was released in a safe place and was not sexually assaulted or seriously injured, then he cannot be imprisoned for more than 25 years. These factors are not elements of a crime; nor are they sentence-enhancing in nature. They can, if shown, result only in a lesser sentence for a defendant. They are in this respect like any other mitigating circumstance or true affirmative defenses, *see, e.g., Patterson v. New York*, 432 U.S. 197 [97 S. Ct. 2319, 53 L. Ed. 2d 281] (1977) ("extreme emotional disturbance"); *State v. Caldwell*, 293 N.C. 336, 237 S.E.2d 742 (1977), *cert. denied*, [434] U.S. [1075], [98 S. Ct. 1264] 55 L. Ed. 2d 780 (1978) (insanity); *Rivera v. Delaware*, 351 A. 2d 561, *app. denied*, 429 U.S. 877 [97 S. Ct. 226, 50 L. Ed. 2d 160] (1976) (insanity), that defendants may take advantage of to reduce or obviate their criminal liability. When the same or similar evidence tends both to show their absence and to prove the commission of some other crime, subjecting a defendant to punishment for the other crime while not reducing his punishment for kidnapping does not offend either the Double Jeopardy or the Law of the Land Clauses.

. . . .

"While not necessary to the decision in this case, we think it desirable to set forth for the guidance of bench and bar procedures which should be followed in applying our interpretation of the kidnapping statute. Normally a jury need only determine whether a defendant has committed the substantive offense of kidnapping as defined in G.S. 14-39(a). The factors

set forth in subsection (b) relate only to sentencing; therefore, their existence or non-existence should properly be determined by the trial judge.

"The judge may make such a determination from evidence adduced at the trial of the kidnapping case itself or at the sentencing hearing provided for in G.S. 15A-1334 following the trial, or at both proceedings. If at either or both proceedings evidence of the existence of the mitigating factors has been presented, the judge must consider this and all other evidence bearing on the question. If the judge is satisfied by a preponderance of the evidence, the burden being upon the defendant to so satisfy him, that the kidnapping victim was released in a safe place and was neither sexually assaulted nor seriously injured, he shall so find and may not then impose a sentence on the kidnapping conviction of more than 25 years or a fine of up to $10,000, or both. If the judge is not so satisfied, he must so state on the record in which case he may impose a sentence of not less than 25 years nor more than life imprisonment. If no evidence either at trial or at the sentencing hearing is adduced tending to show the existence of the mitigating factors then the judge, without making findings, may proceed to impose a sentence of not less than 25 years nor more than life imprisonment.

"In any case the state may stipulate to the presence of all the mitigating factors and thereby avoid determination of the question.

"The procedure here outlined comports with both state and federal constitutional requirements. The procedures prescribed for the sentencing hearing in G.S. 15A-1334(b) accord due process. That the judge rather than the jury makes the crucial factual determinations upon which the ultimate sentence is based does not contravene either state or federal constitutional guarantees of a jury trial in criminal cases. Neither is it violative of constitutional due process to place the burden of persuasion as to the existence of the

mitigating factors on the defendant.

. . . .

"Since the factors to be found here relate solely to the severity of the sentence and not to any element of the offense itself, defendant is not entitled to a jury determination under either the federal or state constitution. In part, we base this conclusion on the fact that matters having to do with severity of sentence within the range authorized by statute for a given offense have been traditionally determined by judges. *See Williams v. New York, supra; State v. Pope, supra.* When, however, a statute, such as the kidnapping statute under consideration, establishes two ranges of sentences and makes their imposition dependent on the presence or absence of additional facts the question of defendant's entitlement to a jury determination of these facts is more difficult. Our conclusion that there is no such entitlement here is bolstered by the proposition that the factors are mitigating rather than enhancing. By statute in North Carolina factors which enhance the punishment are generally made elements of an offense and must be alleged and proved to a jury. General Statute 15A-928, for example, requires this procedure '[w]hen the fact that the defendant has been previously convicted of an offense raises an offense of lower grade to one of higher grade and thereby becomes an element of the latter. . . .' The same requirements prevail under our Habitual Felon Act, G.S. 14-7.1, *et seq. State v. Allen*, 292 N.C. 431, 233 S.E.2d 585 (1977).

"Most courts have, however, sustained against constitutional attack statutory procedures for sentence enhancement even when the enhancing factors are determined by the judge sitting without a jury following conviction of the primary offense. For example, the Federal Dangerous Special Offender Act, 18 U.S.C. § 3575, provides for an increased sentence if a convicted felon is later found by the judge to be a dangerous special offender, the definitions of which are

set out in the Act. This procedure has been upheld by a majority of federal circuit courts against the contention, among others, that defendant is entitled to a jury trial on the question whether he is a dangerous special offender. *United States v. Williamson*, 567 F.2d 610 (4th Cir. 1977); *United States v. Bowdach*, 561 F.2d 1160 (5th Cir. 1977); *United States v. Stewart*, 531 F.2d 326 (6th Cir.) *cert. denied*, 426 U.S. 922, [96 S. Ct. 2629, 49 L. Ed. 2d 376] (1976); *but cf. United States v. Neary*, 552 F.2d 1184 (7th Cir.), *cert. denied*, 434 U.S. 864 [98 S. Ct. 197, 54 L. Ed. 2d 139] (1977) (raising but not resolving constitutional questions). A majority of state courts have, likewise, upheld similar recidivist type statutes under which the trial judge determines whether a convicted felon is indeed a recidivist for purposes of enhancing the penalty under these statutes. *See, e.g., Howard v. State*, 83 Nev. 53, 422 P.2d 548 (1967); *State v. Hoffman*, 236 Or. 98, 385 P.2d 741 (1963), and cases cited therein; *State v. Guidry*, 169 La. 215, 124 So. 832 (1929). *See also*, Note, The Constitutionality of Statutes Permitting Increased Sentences for Habitual or Dangerous Criminals, 89 Harv. L. Rev. 356 (1975); Note, Recidivist Procedures, 40 N.Y.U. L. Rev. 332 (1965). *A fortiori* factors which are mitigating in nature may constitutionally be determined by the sentencing judge." See, also *State v. Squire*, 302 N.C. 112, 273 S.E.2d 688 (1981); *State v. Bright*, 301 N.C. 243, 271 S.E.2d 368 (1980); *State v. Taylor*, 301 N.C. 164, 270 S.E.2d 49 (1980).

We believe that all of the issues raised by the appellants in this appeal have been effectively answered in the authorities above quoted. All of the elements of the crime of kidnapping as set forth in subsection (1) of § 28-313 were alleged in the information and proved by the prosecution. Since the mitigating factors contained in subsection (3) are not elements of the crime, they do not need to be alleged and proven, nor, for that matter, need their absence be alleged and proven. The requirement in Nebraska is only that

the information must state expressly and directly each fact that is an essential element of the crime intended to be charged. *State v. Scott*, 206 Neb. 451, 293 N.W.2d 114 (1980).

The Nebraska kidnapping statute provides in subsection (1) that a person commits kidnapping if he abducts another or, having abducted another, continues to restrain him with the intent to perform certain acts; in this case, to commit a felony. Subsection (2) of the act provides: "*Except as provided in subsection (3) of this section, kidnapping is a Class IA felony.*" (Emphasis supplied.) This clearly reinforces our conclusion that the provisions of subsection (3) are only mitigating circumstances which may reduce the penalty and make the offense punishable as a Class II felony rather than a Class IA felony. The mitigating circumstances set out in subsection (3) of § 28-313 were clearly not even present under the facts of the instant case, as the victim was released by the action of the police rather than by the voluntary act or acts of the abductors. The existence or nonexistence of the mitigating factors was a matter properly considered by the court at sentencing. We conclude, therefore, that the convictions and sentences of the appellants in the District Court must be and hereby are affirmed.

AFFIRMED.

BOSLAUGH, J., concurs in the result.

IN RE WATER APPROPRIATION NO. 442A. CARL WILKINS V. STATE DEPARTMENT OF WATER RESOURCES. IN RE WATER APPROPRIATION NO. 461. CARL WILKINS V. STATE DEPARTMENT OF WATER RESOURCES. IN RE WATER APPROPRIATION NO. 462. CARL WILKINS ET AL. V. STATE DEPARTMENT OF WATER RESOURCES. IN RE WATER APPROPRIATION NO. 485. BRUCE ISKE V. STATE DEPARTMENT OF WATER RESOURCES.

313 N.W.2d 271

Filed December 11, 1981. Nos. 43737, 43738, 43739, 43740.

1. **Waters: Administrative Agencies.** The Department of Water Resources is expressly authorized by statute, after notice and hearing, to forfeit a water right where it appears that the water appropriation has not been used for some beneficial or useful purpose or, having been so used at one time, has ceased to be used for such purpose for more than 3 years.
2. **Waters.** Where it appears that irrigation water has not been applied to lands described in an adjudicated appropriation for the statutory period of 3 years, such nonuse will result in the loss of the right, although the right is one that is termed a vested, adjudicated right.
3. **Constitutional Law: Courts.** One cannot be said to be deprived of his property without due process of law so long as he has recourse to the courts for the protection of his rights.
4. **Waters: Administrative Agencies: Proof.** In a proceeding to cancel a water appropriation pursuant to Neb. Rev. Stat. § 46-229.02 (Reissue 1978), the initial burden of proof is upon the Department of Water Resources. This burden is met upon the filing of the verified report of the water commissioner or engineers of the Department pursuant to § 46-229.04. Thereafter, the burden is upon the appropriator to show cause why the appropriation should not be canceled.

Appeal from the Nebraska Department of Water Resources. Affirmed.

Steven C. Smith of Van Steenberg, Brower, Chaloupka, Mullin & Holyoke for appellant.

Paul L. Douglas, Attorney General, and G. Roderic Anderson for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

KRIVOSHA, C.J.

The four instant consolidated appeals involve water appropriation forfeiture proceedings brought pursuant to Neb. Rev. Stat. §§ 46-229.01 to 46-229.05 (Reissue 1978) held before the Nebraska Department of Water Resources (Department). The proceedings involve separate water appropriations on the Niobrara River identified as D-442A, D-461, D-462, and D-485. The cases were consolidated for briefing and argument by order of this court. After hearing before the Department, the Department found that with regard to D-442A beneficial use of water had not been made for more than 3 years on part of the land under D-442A, and accordingly canceled the water appropriation on 360.6 acres, amounting to 4.26 cubic feet per second (c.f.s.). The Department further found that 244.7 acres under D-442A had been irrigated in the past 3 years, and therefore allowed 2.88 c.f.s. under D-442A to remain in full force and effect.

With regard to D-461, the Department found that beneficial use of water had not been made for more than 3 years on part of the land under D-461, and accordingly canceled the water appropriation on 253 acres, amounting to 3.61 c.f.s. The Department further found that 37 acres under D-461 had been irrigated in the past 3 years, and therefore allowed .53 c.f.s. under D-461 to remain in full force and effect.

With regard to D-462, the Department found that beneficial use of water had not been made for more than 3 years on part of the land under D-462, and accordingly canceled the water appropriation on 229 acres, amounting to 3.27 c.f.s. The Department further found that 26 acres under D-462 had been irrigated in the past 3 years, and therefore allowed .37 c.f.s. under D-462 to remain in full force and effect.

The Department finally found that with regard to

D-485 beneficial use of water had not been made for more than 3 years on any portion of the appropriation under D-485, and accordingly canceled the entire appropriation on about 200 acres, amounting to 2.86 c.f.s.

The landowners have appealed the action of the Department to this court and maintain that the Department erred in failing to recognize that the water appropriations involved herein were vested prior to April 4, 1895, and therefore the statutory forfeiture proceedings provided for in § 46-229.02 do not apply. They further argue that they were denied their rights to due process of law in that they were not afforded a hearing before an impartial tribunal at which time they would be permitted a full evidentiary hearing.

They further maintain that the Department erred in failing to recognize that certain factors beyond the control of the appropriators constituted valid excuses for nonuse. We have now examined the entire record and conclude that the action of the Department was in all respects correct and its order should be in all respects affirmed.

We could set out the facts of these matters in detail. However, the determinations of the issues presented to the court are not dependent upon our recitation of the facts, and for that reason we will not unduly lengthen this opinion by doing so. Suffice it to say that the record discloses a hearing was held by the Department in Chadron, Nebraska, on May 14, 1980, on all four cases. The appellants elected to appear pro se, which may in part account for the difficulty which they later encountered. The record does disclose that water has not been taken for portions of the appropriation for the 3-year period, as found by the Department. Appellants maintain that they are excused for their nonuse. Unfortunately, however, they did not introduce evidence sufficient to satisfy their burden in that regard. The reports of the Department establish the fact that water was not taken for more than 3 years. The appropriators

argue that they are excused for not taking the water because of various difficulties existing in either the river or the canals. The evidence, such as it is, appears to establish that the inability of the appropriators to take water was due to each appropriator's failure to repair the conditions which existed in the river or the canals adjacent to his property and which prevented the appropriators from taking the water. The failure of the appropriators to make the necessary repairs, however, when by doing so within a reasonable time they could have used the water available, does not constitute nonuse of such type as to excuse their failure to use the water during the statutory period. The evidence with regard to "nonuse" in these cases is insufficient to establish the defense as contended by the appropriators.

We therefore turn to the legal arguments raised by the appropriators. Appellants' first contention is that the forfeiture statute does not apply to them because each of the individuals had vested rights in the water appropriations prior to April 4, 1895, the effective date of the water act in question. Appellants acknowledge that we have previously held, in the case of *State v. Birdwood Irrigation District*, 154 Neb. 52, 46 N.W.2d 884 (1951), that the statutory forfeiture provisions were applicable to an appropriation with an adjudicated priority date of October 21, 1893. Appellants maintain, however, that our decision in *Birdwood* was in error and ought to be overruled. We have reexamined our decision in *Birdwood* in light of the arguments raised by appellants and conclude that our decision in that case was correct and should not be overruled. We said in *State v. Birdwood Irrigation District*, *supra* at 56-57, 46 N.W.2d at 888: "The department is expressly authorized by statute, after notice and hearing, to forfeit a water right where it appears that the water appropriation has not been used for some beneficial or useful purpose, or having been so used at one time has ceased to be used for such purpose for more than three years. § 46-229.02, R.S. Supp., 1949. The

constitutionality of the foregoing statute was upheld by this court in Kersenbrock v. Boyes, 95 Neb. 407, 145 N.W. 837, and Dawson County Irrigation Co. v. McMullen, 120 Neb. 245, 231 N.W. 840. In the Kersenbrock case it was held also that the act was not invalid because it applies to both past and future appropriations. We deem these propositions as settled in this state. Consequently, where it appears that irrigation water has not been applied to lands described in an adjudicated appropriation for the statutory period of three years, such nonuser will result in the loss of the right, although the right is one that is termed a vested, adjudicated right. The policy of the law is to require a continued beneficial use of appropriated waters to avert their loss under the nonuser provisions of the irrigation statutes."

The rationale for our decision in *Birdwood* was clearly articulated when we said in that case at 55, 46 N.W.2d at 887: "The Constitution declares the necessity of water for domestic use and for irrigation purposes in this state to be a natural want. Art. XV, § 4, Nebraska Constitution. Our statutory law on the subject of irrigation and the decisions of this court dealing therewith show a clear intention to enforce and maintain a rigid economy in the use of public waters of the state. It is the policy of the law in all the arid states to compel an economical use of the waters of natural streams. One of the very purposes of the state in the administration of public waters is to avoid waste and to secure the greatest benefit possible from the waters available for appropriation for irrigation purposes."

There can be little argument that the state has a right under both the police powers of the state and the provisions of the Nebraska Constitution to regulate the use of the waters of natural rivers and streams so that waste is eliminated. See, *State ex rel. Cary v. Cochran*, 138 Neb. 163, 292 N.W. 239 (1940); Neb. Const. art. XV, §§ 4, 5, and 6. As we said in *State v. Birdwood Irrigation District, supra* at 55, 46 N.W.2d at 887: "The ad-

judication of the water right gave to the Birdwood Irrigation District and its predecessors in interest a vested right to the use of the waters appropriated, subject to the law at the time the vested interest was acquired and such reasonable regulations subsequently adopted by virtue of the police power of the state."

To exempt from such control water rights acquired prior to the date of the act created for the specific purpose of preventing waste would be to ignore the mandate of our Constitution and make ineffective the very end sought to be obtained. We are unwilling to do so and must therefore ratify our previous holding in the *Birdwood* case.

Doing so, our holding in the *Birdwood* case is dispositive of appellants' first assignment of error, which must be overruled.

As to appellants' second argument that the statutes offend constitutional notions of due process because they deny to appellants an opportunity to an evidentiary hearing, we must likewise reject the argument. The act in question specifically grants to appellants an opportunity to present such evidence as they wish in their effort to prevent a cancellation of their appropriation. See § 46-229.04. Likewise, as is evident, an appropriator who is dissatisfied with the decision of the Department may appeal directly to the Supreme Court. See § 46-229.05. We have previously reviewed the scheme whereby certain quasi-judicial authority has been given to the Department and have held that such authority does not offend or violate due process. *Dawson County Irrigation Co. v. McMullen*, 120 Neb. 245, 231 N.W. 840 (1930). Specifically, in *Dawson, supra* at 250, 231 N.W. at 843, we said: "One cannot be said to be deprived of his property without due process of law so long as he has recourse to the courts for the protection of his rights. The statute affords ample opportunity to plaintiff in this case, if aggrieved by any action of the department of public works, to seek redress from its decision to the courts."

While the statute involved in *Dawson County Irrigation Co. v. McMullen* has been amended, we do believe that what we there said is still applicable. Furthermore, the provisions of the Administrative Procedures Act are applicable to the Department of Water Resources. Upon motion by the appellants, the use of formal rules of evidence could have been required. When so required, the Department would be obligated to hold a full evidentiary hearing affording to appellants whatever further due process they maintain they were otherwise denied. See Neb. Rev. Stat. §§ 84-901 to 84-919 (Reissue 1976). In this case they made no objection to the form of the hearing at that time, nor did they request formal rules of evidence themselves, and chose to informally present whatever matters they desired. Whatever holes may exist in the evidence is not due to the provisions of the act but, rather, due to appellants' inexperience at presenting evidence before a tribunal. Their second assignment of error must likewise be rejected.

Turning then to the next argument raised by appellants to the effect that the Department failed to meet its burden in that the evidence presented by the Department was insufficient to justify its actions, we need only look to the statutes. The statutes of the State of Nebraska pertaining to matters of this nature are clear with regard to where the burden of proof lies. The statutes provide that in the first instance the Department bears the burden to establish nonuse for the statutory period. All that need be done to establish that fact is the verified report of the Department. Once that report is presented by the Department, then a hearing may be held if requested by the appropriators, at which time the appropriators must show cause why the appropriation should not be terminated. The language of the statute clearly indicates that the burden is upon the appropriator to present evidence showing either that water was taken, contrary to the report filed by the Department, or that some excuse existed for the water not being taken. *State v. Birdwood Irrigation District,*

154 Neb. 52, 46 N.W.2d 884 (1951); *Hostetler v. State*, 203 Neb. 776, 280 N.W.2d 75 (1979). As we have already noted, a review of the record fails to disclose any evidence which would constitute excuse for nonuse as it has been interpreted by this court. The appropriators failed to overcome the prima facie case made by the Department.

It is regrettable that the appellants chose to represent themselves in this matter and as a result thereof were unable to produce a better record. It may very well be that a better record could have been produced. We are unable to ascertain that from the facts at hand. What we are able to ascertain is that the action of the Department is supported by the evidence presented and no sufficient evidence was presented by the appropriators which constituted a legal excuse for their nonuse of the water. That being the case, the Department was without choice but to cancel the appropriation after the passage of the statutory time.

The action of the Department is in all respects affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. SPORTS COURIERS, INC., AND JERRY SUBJECT, APPELLANTS.

313 N.W.2d 447

Filed December 11, 1981. No. 44080.

1. **Criminal Law: Appeal and Error.** As a general rule the right to appeal in a criminal case can only be exercised by the party to whom it is given, and normally only a person aggrieved or injured by a judgment may take an appeal from it.
2. ____: ____. A person who has been released and discharged from further prosecution under a complaint is not legally aggrieved and therefore cannot appeal.
3. ____: ____. Insofar as such a person's standing to appeal is concerned, it

makes no difference whether the dismissal still leaves the defendant open to further prosecution for future violations.

4. ____: ____. A defendant has no right to appeal in a proceeding under Neb. Rev. Stat. § 29-2317 (Reissue 1979) because such proceeding has no effect on the rights of a person who has been placed in jeopardy.

Appeal from the District Court for Douglas County: SAMUEL P. CANIGLIA, Judge. Appeal dismissed.

Mark D. Theisen of Berens & Associates and Richard J. Bruckner for appellants.

Herbert M. Fitle, Omaha City Attorney, Gary P. Bucchino, Omaha City Prosecutor, and Richard L. Dunning, Omaha Assistant City Prosecutor, for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

HASTINGS, J.

In September 1978 the defendants, Sports Couriers, Inc., and Jerry Subject, were charged in the municipal court of Omaha with violation of § 25.77.020, Ord. 24314, § 1, Omaha Municipal Code. This section declares it to be unlawful for any person "knowingly to gamble, offer to gamble, or provide facilities for gambling." The municipal court found and determined that the actions of the defendants in receiving money to be carried to Las Vegas and there placed as bets did not amount to providing gambling facilities, and dismissed all charges pending against the defendants. The State of Nebraska, through the offices of the Omaha city attorney, prosecuted an appeal to the District Court as provided for in Neb. Rev. Stat. § 29-2317 (Reissue 1979). The matter was submitted to the District Court, and on January 7, 1981, Judge Caniglia entered an order that "I disagree with the Lower Court's finding that the activities of the defendants are not gambling within the meaning of the City ordinances . . . ." The defendants have perfected their appeal to this court. We dismiss the appeal.

Section 29-2317 provides in part: "(1) A prosecuting attorney, including any . . . city attorney . . . may take exception to any ruling or decision of the municipal . . . court . . . by presenting to the court a notice of intent to take an appeal to the district court . . . ." Neb. Rev. Stat. § 29-2319 (Reissue 1979) provides: "(1) The judgment of the court in any action taken under the provisions of sections 29-2317 and 29-2318 shall not be reversed nor in any manner affected when the defendant in the trial court has been placed legally in jeopardy . . . . (3) When the district court affirms the final order of the trial court, the prosecuting attorney may take exception to the decision of the district court in the manner provided by sections 29-2315.01 to 29-2316." The only reference in the whole of Chapter 29, article 23, of the Nebraska Revised Statutes to a person other than a prosecuting attorney having the right to appeal under those sections is found in Neb. Rev. Stat. § 29-2301 (Reissue 1979). That section provides in part: "When a person *shall be convicted of an offense* . . . the court may . . . give the person so convicted an opportunity to apply for such writ [of error]." (Emphasis supplied.) The defendants contend and the State concedes in its brief that the prosecution in this instance was a criminal action, thus barring appeal or refiling of the same charges under the double jeopardy provisions of both the state and federal Constitutions. Therefore, the defendants are not "persons convicted of an offense" so as to qualify them to seek a writ of error under the provisions of § 29-2301.

The general appeal procedure is found in Neb. Rev. Stat. §§ 25-1911 et seq. (Reissue 1979). Section 25-1911 provides: "A judgment rendered or final order made by the district court may be reversed, vacated or modified by the Supreme Court for errors appearing on the record." However, in *State v. Berry*, 192 Neb. 826, 224 N.W.2d 767 (1975), we held that as a general rule the right to appeal in a criminal case can only be exercised by the party to whom it is given, and generally only a person aggrieved or injured by a judgment may

take an appeal from it.

In *Lewis v. United States*, 216 U.S. 611, 30 S. Ct. 438, 54 L. Ed. 637 (1910), the court held that a person who has been released and discharged from further prosecution under a complaint is not legally aggrieved and therefore cannot appeal. So far as such a person's standing to appeal is concerned, it makes no difference whether the dismissal still leaves him open to further prosecution for future violations. *Parr v. United States*, 351 U.S. 513, 76 S. Ct. 912, 100 L. Ed. 1377 (1956).

The only case which we have decided involving an appeal by a defendant to this court following an appeal by the prosecuting attorney to the District Court under § 29-2317 is *State v. McDermott*, 200 Neb. 337, 263 N.W.2d 482 (1978). Although the issue of standing was not discussed in the majority opinion, some of its language is helpful, and the dissenting opinion by Boslaugh, J., is directly in point. There the defendant had been convicted in county court and sentenced to 6 months in jail, with a condition attached. Five days after the defendant was committed to jail, he filed a motion for modification of the sentence, and 4 days later the county court granted the motion and sentenced him to probation for a period of 1 year with a condition that he serve 89 days in jail. On appeal to the District Court by the county attorney under § 29-2317, that court found that the county court had no authority to review or change the sentence and reinstated the original sentence. We held that because the defendant had been placed legally in jeopardy in the county court the decision of the District Court would only govern future cases and not the defendant in this case. We went on to point out that because the defendant had served all jail and probation time ordered, the amended judgment of the county court had been fully executed and the "defendant cannot be adversely affected by this appeal."

The distinguishing feature of *McDermott*, however, is that the effect of the judgment in District Court was to order him to serve the balance of 6 months in jail,

and therefore he certainly was aggrieved or injured by that judgment and would have standing to appeal. In the instant case, no such judgment was entered which aggrieved the defendants.

Applying all the foregoing rules to the facts of this case, we believe that there is no provision for an appeal by a defendant in a proceeding under § 29-2317, because the proceeding has no effect on the rights of a defendant who has been placed in jeopardy.

The defendants had no standing to appeal the judgment of the District Court, and therefore this appeal is dismissed.

APPEAL DISMISSED.

HERBERT H. MARTENEY, APPELLANT, V. STATE OF NEBRASKA, APPELLEE.

313 N.W.2d 449

Filed December 11, 1981. No. 44194.

1. **Pleas.** A plea of guilty, if understandingly and voluntarily entered, is conclusive.
2. **Pleas: Waiver.** A plea of guilty embodies a waiver of every defense to a charge, whether procedural, statutory, or constitutional.
3. **Pleas: Mental Incompetence.** The test of mental capacity to plead or stand trial is the same.
4. ____: ____. The question of whether or not a defendant is competent to stand trial or to enter a plea is one of fact to be determined by the trial court, and the means employed in resolving the question are discretionary with the trial court.
5. **Post Conviction: Proof: Appeal and Error.** The person seeking post conviction relief has the burden of establishing a basis for such relief, and the findings of the District Court in denying relief will not be disturbed on appeal unless they are clearly erroneous.
6. **Pleas: Proof.** A plea of guilty supported by a sufficient factual basis renders unnecessary the proof of the facts alleged in the complaint and cures any error which may have been made by the District Court in ruling on a plea in abatement.
7. **Criminal Law: Effectiveness of Counsel.** The test for determining the competency or effectiveness of trial counsel is that they perform at least as

well as a lawyer with ordinary training and skill in the criminal law in his area and that they conscientiously protect the interests of their client.

8. **Post Conviction: Sentences.** A claim that a sentence imposed within statutory limits was excessive is not a basis for post conviction relief.
9. **Mental Incompetence: Waiver: Pleas.** Mental capacity of the defendant at the time of an alleged offense is waived as a defense by a plea of guilty voluntarily and understandingly entered.

Appeal from the District Court for Pawnee County: WILLIAM F. COLWELL, Judge. Affirmed.

Herbert Marteney, pro se.

Paul L. Douglas, Attorney General, and Marilyn B. Hutchinson for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY and HASTINGS, JJ.

HASTINGS, J.

This is an appeal from an order of the District Court for Pawnee County which denied Herbert H. Marteney post conviction relief. We affirm.

Petitioner Marteney was charged with first degree murder as a result of the August 16, 1978, shooting death of Lynn A. Meier. Pursuant to a plea bargain, Marteney pleaded guilty to second degree murder and was sentenced to a term of imprisonment of 12 years. Although he had been represented by counsel at all stages up through sentencing, no direct appeal was ever filed. Instead, petitioner filed, pro se, a petition for post conviction relief which was docketed in the District Court separately from his criminal conviction. However, his court-appointed counsel represented Marteney at a proceeding to determine whether or not he was entitled to an evidentiary hearing on his petition for post conviction relief. The records from the preliminary hearing and the arraignment and sentencing were all received in evidence, and the District Court then ruled that no evidentiary hearing was required and the petition was ordered dismissed. Marteney has appealed,

pro se, assigning as errors that the decision was not sustained by sufficient evidence, the decision was contrary to law, and the decision is in violation of the eighth and fourteenth amendments to the Constitution of the United States.

As characterized by the trial judge, "plaintiff's Petition is a long, rambling statement without concise factual allegations of any constitional [sic] violations . . . ." Therefore, to properly analyze his contentions, it is necessary to review certain portions of the record.

Following a preliminary hearing the county judge ordered Marteney bound over to District Court to answer the charge of first degree murder. A plea in abatement was filed and heard in District Court and was overruled. An arraignment was held, during which petitioner's rights were explained to him, including the presumption of innocence, the right to an attorney, the right to trial by jury, the right to call witnesses, the privilege against self-incrimination, the right to confront his accusers, and the right to require the State to meet its burden of proof. He was also advised of the penalties for first and second degree murder and manslaughter, and was told of the elements necessary for a conviction in each case. Upon advice of counsel, Marteney stood mute when asked to plead, and a plea of not guilty was entered in his behalf. His attorney also raised the question of Marteney's mental competency to stand trial. The trial judge then advised Marteney that "a plea of Insanity is included in your Not Guilty plea," but went on to explain that it would not be considered unless made a part of the record at least 10 days before trial. Arrangements were then made to have the petitioner examined for the court to determine his competency to stand trial. Petitioner's motion that he be examined by Dr. Whitla was granted, and petitioner's counsel was told by the court that he might secure an examination for any purpose that he might desire.

At a hearing held on November 14, 1978, for the purpose of determining petitioner's competency to stand

trial, by stipulation of the parties there was received in evidence a written report dated November 9, 1978, from Dr. F. E. Whitla, a Lincoln psychiatrist, and a written report dated November 2, 1978, from Wayne R. Price, Ph.D., chief psychologist of the Blue Valley Mental Health Center. Dr. Whitla concluded that Marteney was not competent to stand trial as of the date of his report, whereas Dr. Price concluded that he was. In addition to these reports, the trial court stated that he was also basing his determination on the presence and acts of Marteney on that date and on previous appearances. One such act was the appearance of this petitioner one afternoon in court in the uniform of the United States Air Force. When asked by the court to explain such dress, Marteney answered, "because of that flag that is standing right there behind you, sir. I'm proud of that flag." On the other hand, the trial court had extensively questioned the petitioner during his original arraignment, and his answers, for the most part, were reasonable, responsive, and appropriate. The court concluded that Marteney had the capacity to comprehend his own condition, to make a rational defense, and to assist his counsel.

On March 12, 1979, the date set for trial, Mr. Marteney appeared in court with his counsel and, pursuant to an agreement whereby the charge would be reduced from first degree murder to second degree murder, entered a plea of guilty. At that arraignment, the court reviewed all the proceedings to date and reminded Marteney in general terms of his rights, the elements of the various degrees of homicide, and of the punishment possible in each instance. He also ascertained from the petitioner that he was competely satisfied with the services rendered him by his attorneys and that no one had exerted any undue influence on him or promised him any particular punishment. The petitioner was again reminded that he had a right to a jury trial, the right to plead not guilty, the right to assistance of counsel, and the presumption

of innocence. He was also told that a plea of guilty was a waiver of "all of your rights to a jury trial, to have witnesses appear on your behalf, and, your presumption of innocence, all these things." Following the entry of a plea of guilty, a factual basis for such plea was furnished by the prosecuting attorney and concurred in by Marteney. In substance, the petitioner agreed that the rifle used in the fatal shooting was his, that he fired the rifle, that he had pointed it at the victim, and that he was satisfied that the firing of the gun was the cause of death. The court also received in evidence a letter report dated March 7, 1979, from Dr. Price, which reiterated his opinion that petitioner was then competent to stand trial and to enter a voluntary plea. Also available to the court was a March 6, 1979, order by the mental health board of Pawnee County discharging the petitioner from the hold previously placed upon him by the board.

Utilizing a liberal interpretation of Marteney's petition for post conviction relief, the district judge considered that it did allege the incompetency of Marteney at the time of entering his plea, an excessive sentence, unlawful preliminary proceedings, and a vague suggestion of ineffective counsel. The petition also alleged that proof of the element of intent to kill was absent because of his lack of understanding as to what he had done. This could be interpreted as a claim of insanity at the time of the fatal shooting.

The petitioner argues in his brief on appeal that the sentence was excessive because the evidence against him was only sufficient to establish his guilt as to the crime of manslaughter, Neb. Rev. Stat. § 28-403 (Reissue 1975), but not as to a violation of Neb. Rev. Stat. § 28-402 (Reissue 1975), murder in the second degree. If such were the fact, the maximum sentence he could have received was imprisonment for 10 years. He bases his premise on the fact that there was no expert testimony as to the cause of death, that there was no evidence of his intent to kill, and there was some evidence shortly after the crime of unsoundness of mind on the

part of Marteney.

Most of petitioner's complaints are answered by the general rule of law existing in this state that a plea of guilty, if understandingly and voluntarily entered, is conclusive. *State v. Livingston*, 182 Neb. 257, 153 N.W.2d 925 (1967). *State v. Griger*, 190 Neb. 405, 208 N.W.2d 672 (1973), was more specific and stated that a plea of guilty embodies a waiver of every defense to a charge, whether procedural, statutory, or constitutional. As to the matter of proof of the facts necessary to support a guilty plea, we said in *Clark v. State*, 150 Neb. 494, 497, 34 N.W.2d 877, 879 (1948): "A plea of guilty to a criminal complaint admits that the offense was committed, the time and place of its commission, and the identity of the person committing it, as charged; it is an admission of record of the truth of the charges made; it renders unnecessary the proof of the facts alleged; and it supports a finding of guilt made thereon."

In *State v. Campbell*, 192 Neb. 629, 223 N.W.2d 662 (1974), this court held that the test of mental competency to plead or stand trial is the same, i.e., whether the defendant has capacity to understand the nature and object of the proceedings and to comprehend his own condition in reference to such proceedings and to make a rational defense. The question of whether or not a defendant is competent to stand trial is one of fact to be determined by the trial court, and the means employed in resolving the question are discretionary with the trial court. *State v. Rhodes*, 191 Neb. 131, 214 N.W.2d 259 (1974). The defendant has the burden of establishing a basis for relief in a post conviction proceeding under Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1979), and the findings of the District Court in denying such relief will not be disturbed on appeal unless they are clearly erroneous. It is the general rule that it is not within the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh evidence. Such matters are for

the trier of fact, and his findings and order must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Rust*, 208 Neb. 320, 303 N.W.2d 490 (1981). From our review of the record, we conclude that there is sufficient evidence to support the trial court's finding that the petitioner was mentally competent to stand trial and to enter a plea of guilty.

The petitioner complains of the unlawfulness of preliminary proceedings. From a reading of his brief, he suggests that the evidence adduced at the preliminary hearing was insufficient to prove the cause of death. A plea of guilty supported by a sufficient factual basis renders unnecessary the proof of the facts alleged in the complaint and cures any error which may have been made by the District Court in ruling on a plea in abatement. *Clark v. State; supra; State v. Franklin*, 194 Neb. 630, 234 N.W.2d 610 (1975). From our examination of the record we conclude that there is no merit to the petitioner's contention that the District Court erred in overruling his plea in abatement.

The petitioner also complains that the hearing to determine his competency to stand trial was irregular because medical reports were received into evidence rather than having the doctors present to testify themselves. The answer to this is simple. Counsel for both the petitioner and the State of Nebraska stipulated that such letters could be utilized for the purpose of that hearing.

Petitioner's reference to ineffective counsel is also not supported by the record. One of the attorneys appointed to represent him was specifically requested by Marteney. He advised the District Court at the time of his sentencing that he was completely satisfied with his lawyers and the services rendered by them. Even in his brief in this court he stated that "he does not attack per se the conduct of either his trial counsel or the prosecution . . . ." The person challenging the competence of counsel has the burden of proof to establish counsel's

incompetence. *State v. Kelly*, 190 Neb. 41, 205 N.W.2d 646 (1973). The test for determining the competency or effectiveness of trial counsel is that they perform at least as well as a lawyer with ordinary training and skill in the criminal law in his area and that they conscientiously protect the interests of their client. *State v. Leadinghorse*, 192 Neb. 485, 222 N.W.2d 573 (1974). We find that petitioner's counsel met this test.

Petitioner's claim that the sentence imposed upon him was excessive is also groundless. The maximum sentence allowed by law was a term of imprisonment for life. A claim that a sentence imposed within statutory limits was excessive is not a basis for post conviction relief. *State v. Walker*, 197 Neb. 381, 248 N.W.2d 784 (1977).

Petitioner's remaining contention that he lacked sufficient mental capacity to form the necessary intent to commit the crime of second degree murder is without substance. If this is to be construed that he claims to have been not guilty by reason of insanity, such a plea is required to be raised at the time of arraignment or not later than 10 days before trial. Neb. Rev. Stat. § 29-2203 (Reissue 1979). Marteney's mental capacity existing at the time of the fatal shooting was never raised during the course of the proceedings in the trial court. In any event, as previously stated, mental capacity as a defense or lack of proof of intent were both waived by the guilty plea tendered by the petitioner.

We find that the trial judge did not abuse his discretion in refusing to grant an evidentiary hearing on Marteney's petition for post conviction relief, and his order dismissing the petition was correct. The judgment is affirmed.

AFFIRMED.

WHITE J., participating on briefs.

CEDARS CORPORATION, APPELLANT, V. CRAIG F. SWOBODA, APPELLEE.

313 N.W.2d 276

Filed December 11, 1981. No. 44407.

Legislature: Limitations of Actions. It is competent for the Legislature to change statutes prescribing limitations to actions. The one in force at the time suit is brought is applicable to the cause of action.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Affirmed.

John D. Sykora of Law Offices of John D. Sykora for appellant.

Thomas J. Guilfoyle and George O. Rebensdorf of Law Offices of Thomas J. Guilfoyle for appellee.

Submitted without oral argument. KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

BOSLAUGH, J.

This case presents the question of whether a statute of limitations which became effective July 6, 1972, bars the plaintiff's action commenced February 24, 1981, to recover for a negligent act that occurred on November 26, 1969.

The defendant is an attorney at law admitted to practice in Nebraska. The petition alleges that on August 16, 1969, while employed by the plaintiff, the defendant delivered books and records of the plaintiff to an adverse party. The plaintiff claims that it was damaged as a result of that alleged breach of confidence. After the defendant had demurred to the petition, the plaintiff did not amend its petition but filed an "Offer of Proof with Respect to Ruling on Defendant's Demurrer," in which the plaintiff attempted to allege that it did not discover the defendant's negligent act until August 18, 1980.

The trial court sustained the demurrer and dismissed the action. The plaintiff has appealed.

Neb. Rev. Stat. § 25-222 (Reissue 1979) provides: "Any action to recover damages based on alleged professional negligence or upon alleged breach of warranty in rendering or failure to render professional services shall be commenced within two years next after the alleged act or omission in rendering or failure to render professional services providing the basis for such action; *Provided,* if the cause of action is not discovered and could not be reasonably discovered within such two-year period, then the action may be commenced within one year from the date of such discovery or from the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier; *and provided further,* that in no event may any action be commenced to recover damages for professional negligence or breach of warranty in rendering or failure to render professional services more than ten years after the date of rendering or failure to render such professional service which provides the basis for the cause of action." The 10-year overall limitation became effective July 6, 1972. The issue is whether the statute now bars the plaintiff's action.

It is generally held that a statute of limitations does not impair existing substantive rights but merely affects the procedure by which such rights may be enforced. Generally, such statutes apply to all proceedings commenced after the statute becomes effective. *Educational Service Unit No. 3 v. Mammel, O., S., H. & S., Inc.,* 192 Neb. 431, 222 N.W.2d 125 (1974). In *Horbach v. Miller,* 4 Neb. 31, 45-46, (1875), this court said: "'It is well settled that it is competent for the legislature to change statutes prescribing limitations to actions, and that the one in force at the time suit is brought is applicable to the cause of action.'"

Under the plaintiff's theory of the facts, the action was not barred by § 25-222 until after November 26, 1979. The period of time intervening between the effective date of the section, July 6, 1972, and the date the bar of the statute occurred was sufficient to satisfy any

constitutional objection. *Horbach v. Miller, supra; Educational Service Unit No. 3 v. Mammel, O., S., H. & S., Inc., supra; Regents of U. of Calif. v. Hartford Acc. & Indem. Co.*, 59 Cal. App. 3d 675, 131 Cal. Rptr. 112 (1976), *vacated on other grounds*, 21 Cal. 3d 624, 581 P.2d 197, 147 Cal. Rptr. 486 (1978).

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOHN W. ENGELHAUPT, APPELLANT.

313 N.W.2d 437

Filed December 11, 1981. No. 44475.

Appeal from the District Court for Cass County: RAYMOND J. CASE, Judge. Affirmed.

William R. Reinsch for appellant.

Paul L. Douglas, Attorney General, for appellee.

Submitted without oral argument. KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

PER CURIAM.

The defendant was charged with criminal failure to pay child support under the provisions of Neb. Rev. Stat. § 28-706(1)(6) (Reissue 1979) in violation of an order of the court entered in a divorce action. Defendant pled not guilty. He waived a jury trial, was found guilty, and sentenced to a term of 1 year in the Nebraska Penal and Correctional Complex. The only issue on appeal is whether the sentence is excessive.

The record establishes that the defendant was divorced on December 21, 1977, and directed to pay the sum of $140 per month in semimonthly payments for support of his child, then less than 1 year of age. The

clerk of the District Court testified that at the time of trial the defendant was in arrears in payment through December 15, 1980, in the total amount of $2,740, as shown by the records of the court. The testimony of the wife was that the defendant was regularly employed at all times, and the record discloses that he has a take-home pay of $550 a month. The wife is on ADC and all or most of the payments made by the defendant are going to the welfare department.

The defendant did not take the stand in his own behalf.

The presentence investigation indicates that the defendant is 31 years of age, born at Lynch, Nebraska. He is a cowboy employed by Timmerman Feed Yards at Springfield, Nebraska, and has been so employed for 8 years. He works regularly. He has some physical handicap because of childhood polio and a later tractor accident. He has an eighth grade education. His gross monthly pay is $750 and his take-home pay is $550. His vice is that he drinks three or four beers after work daily and gets drunk every 2 weeks.

It is reported in the presentence investigation that he stated he got behind on payments because his wife at first would not let him see the child; he reacted by not paying and then he could not catch up. He borrowed money to meet his arrearage when he was threatened with prosecution once previously, and he paid $900 at that time.

He is indebted to two different banks for $300 each and he pays one back $50 a month and the other $78. He owes the gas company $230 and pays that delinquency at $40 per month. In addition to the foregoing payments totaling $168, he pays $125 per month trailer rent, $20 for utilities, and $10 for insurance. This leaves $227 per month. Subtracting the $140 for child support, he has $87 for food, gasoline, and other expenses. He made $1,250 in child support payments during the year preceding sentencing.

The maximum penalty for the offense charged, a Class IV felony, is 5 years' imprisonment or $10,000

fine, or both. The trial court did not abuse its discretion.
AFFIRMED.

McCOWN, J., dissenting.

The factual circumstances of this case demonstrate the inappropriateness of a penitentiary sentence for the defendant. Such punishment destroys any possibility of his paying any child support for the term of his imprisonment and may prejudice his employment opportunities thereafter. He has been regularly employed for 8 years and has made some substantial payments from time to time and incurred indebtedness in order to make some of them. His income is at the poverty level. With his present obligations, including current child support amounts, he has only $87 per month left for food, medicine, and clothing. The circumstances demand probation or some sentence permitting the defendant to continue his employment and may require modification of the amount of child support required to be paid. The punishment does not fit the crime nor the defendant. Neither does it solve the problem of collecting child support.

BOSLAUGH, J., joins in this dissent.

ALLSTATE INSURANCE COMPANY, APPELLEE, V. SHARON NOVAK AND TONY NOVAK, APPELLANTS.

313 N.W.2d 636

Filed December 18, 1981. No. 43566.

1. **Declaratory Judgments.** In order to maintain an action for declaratory judgment under the provisions of Neb. Rev. Stat. § 25-21,149 (Reissue 1979), there must be an actual controversy. It cannot be used to decide the legal effect of a state of facts which are future, contingent, or uncertain. There must, at the time that the declaration is sought, be an actual justiciable issue.
2. **Insurance: Damages.** An injury resulting from an act committed by an insured in self-defense is not, as a matter of law, an expected or intended

act within the meaning of a policy of insurance exempting bodily injuries or property damages which are either expected or intended from the standpoint of the insured.

3. ____:____ An insurer has a duty to defend its insured whenever it ascertains facts which give rise to the potential of liability under the policy. The insurer may not confine its investigation to the allegations of the petition filed by the party claiming damages.

Appeal from the District Court for Sarpy County: GEORGE H. STANLEY, Judge. Reversed and remanded with instructions.

Robert C. Wester of Schirber Law Offices, P.C., for appellants.

John P. Miller of Miller & Rowen, P.C., for appellee.

Heard before KRIVOSHA, C.J., MCCOWN, and HASTINGS, JJ., and KORTUM and GRANT, District Judges.

KRIVOSHA, C.J.

The appellants, Sharon Novak and Tony Novak, husband and wife, hereafter referred to as Novak, appeal from a declaratory judgment entered by the District Court for Sarpy County, Nebraska, holding in effect that the appellee, Allstate Insurance Company (Allstate), is neither obligated to defend Novak nor pay any judgment rendered against Novak under the terms of a certain policy of insurance issued by Allstate to Novak. We believe that the action of the trial court was in error and must be reversed.

The act which gives rise to our having to consider the applicability of the instant policy concerns an alleged assault and battery by Tony Novak against one Terry Stewart. The controversy, however, between Novak and Stewart has not, as yet, been resolved. Therefore, we are unable to know what the ultimate determination of that question will be. Our inability to know the result of that dispute is a key factor in our determination of this case.

The evidence presented to us in this case consists of the petition filed by Stewart in his case against Novak,

plus certain depositions taken in the action between Allstate and Novak. The record discloses that the occurrence giving rise to this litigation took place on September 28, 1978. At that time Stewart was helping a friend with the construction of an addition or garage to the friend's house located next to the home owned by the Novaks. Mrs. Novak, in a statement, stated that Mr. Stewart had been using abusive language toward her and that he had urinated in or near their yard in front of her. When her husband, Mr. Novak, arrived home at approximately 7:30 to 8:30 that evening, she informed him of what had taken place. According to Mrs. Novak, Mr. Novak immediately proceeded to the construction site where Mr. Stewart was working. In his deposition, Mr. Novak stated that he asked the owner of the house if his bathroom was working and why he, the owner, had allowed Mr. Stewart to urinate in his yard.

Novak further testified that at this point Stewart began to hurl obscene epithets at Novak and at the same time started moving toward him. Novak indicated that he had no idea whether Stewart had something in his fist with which he was going to strike Novak but that his tone of voice, his selection of words, and his sudden movement toward Novak led Novak to believe that Stewart was about to strike him, either with his fist or perhaps with a beer bottle.

Novak maintains that he then instinctively acted in self-defense by striking Stewart in the face. Mr. Stewart was knocked to the ground and ran away immediately after being hit.

Stewart, on the other hand, maintains by deposition that he was sitting down on the partially built wall and that he never said anything to Novak before Novak struck him. Stewart further denied that he had made any obscene comments to Mrs. Novak or had urinated in the Novak yard. The owner of the premises, in his deposition, testified that he spoke to Novak across the building but could not remember what they said. He testified that he did not know Mr. Stewart had urinated

in Novak's yard.

Thereafter, Stewart filed an action against Mr. Novak in the District Court for Sarpy County, Nebraska. In his petition he alleged that Novak "without any cause or provocation therefor . . . willfully, wantonly and maliciously struck [Stewart] from the side with great force and violence . . . ."

At the time of the alleged altercation the Novaks owned a certain policy of insurance issued by Allstate. The pertinent portion of the policy provides in part as follows: "Allstate agrees to pay on behalf of the Insured all sums which the Insured shall become *legally obligated* to pay as damages because of bodily injury or property damage to which this insurance applies, caused by an occurrence. Allstate shall have the right and duty, at its own expense, to defend any suit against the Insured seeking damages on account of such bodily injury or property damage, even if any of the allegations of the suit are groundless, false or fraudulent, but may make such investigation and settlement of any claim or suit as it deems expedient." (Emphasis supplied.)

The Novaks called upon Allstate to provide them with a defense to Stewart's lawsuit and to pay any sums which Novak might legally be obligated to pay because of bodily injury to Stewart. Allstate refused to either provide a defense or to pay any damages, on the basis that the action by Novak, as claimed by Stewart, was not covered by the policy. Its position was based upon an exclusion in the policy which provided in part as follows: "This policy does not apply . . . (f) to bodily injury or property damage which is either expected or intended from the standpoint of the Insured." Specifically, Allstate maintains that by reason of our decisions in *State Farm Fire & Cas. Co. v. Muth*, 190 Neb. 248, 207 N.W.2d 364 (1973), and *Jones v. Norval*, 203 Neb. 549, 279 N.W.2d 388 (1979), it is under no obligation under the terms of the policy to either provide a defense or to pay any damages.

It occurs to us that there are two separate and distinct

obligations provided for by this contract of insurance. In the first instance, Allstate agrees to pay on behalf of the insured all sums which the insured shall become legally obligated to pay because of bodily injury. That is one contractual obligation existing between Allstate and Novak. The second obligation, which is separate and apart from the obligation to pay, is the "right *and duty* . . . to defend any suit against the Insured." (Emphasis supplied.) See, *Satterwhite v. Stolz*, 79 N.M. 320, 442 P.2d 810 (1968); *Travelers Indemnity Company v. East*, 240 So. 2d 277 (Miss. 1970); *Yakima Cement Prod. Co. v. Great American Ins. Co.*, 14 Wash. App. 557, 544 P.2d 763 (1975).

Not only does the carrier have a right to defend but it has a corresponding duty to do so. This duty is rather broad in that the policy provides that the carrier has a duty to defend even though the suit is "groundless, false or fraudulent." That is to say, the duty to defend is greater than the obligation to pay. There is no requirement that there must be a reasonable likelihood of recovery or even a good faith claim. It is possible by reason of the language of this policy that the company may be obligated to defend a groundless, false, or fraudulent claim though it may not ultimately be required to make any payment.

We first address the question of whether we can at this time declare whether the carrier has an obligation to pay. The simple fact of the matter is that until the facts in this case are resolved the court cannot determine Allstate's obligation to pay and cannot therefore grant declaratory judgment on that question. In order to maintain an action for declaratory judgment under the provisions of Neb. Rev. Stat. § 25-21,149 (Reissue 1979), there must be an actual controversy. It cannot be used to decide the legal effect of a state of facts which are future, contingent, or uncertain. There must, at the time that the declaration is sought, be an actual justiciable issue. See *Miller v. Stolinski*, 149 Neb. 679, 32 N.W.2d 199 (1948). The question now pre-

sented to us is whether we can judicially determine whether Allstate is required to make payment on behalf of Novak. However, until it is determined that Novak is legally obligated to pay Stewart, the question of Allstate's obligation is uncertain and contingent. See *Firemen's Ins. Co. of Newark, New Jersey v. Burch*, 442 S.W.2d 331 (Tex. 1968). Unless it can be said that Stewart is entitled to a summary judgment against Novak on his cause of action, we cannot determine Allstate's obligation to pay on behalf of Novak. Allstate does not have an obligation to pay for all acts committed by the insured even though the act by the insured may produce an injury covered by the policy. It is obligated to pay *only* if the insured becomes legally obligated to pay. Allstate, under the facts presented to the court, may never be required to pay because Novak may never become legally obligated to pay. The distinction between this case and the cases of *State Farm Fire & Cas. Co. v. Muth*, *supra*, and *Jones v. Norval*, *supra*, are significant. In both *Muth* and *Jones*, judgments were already obtained against each insured who was already legally obligated to pay before the declaratory judgment action was brought by the carrier against the insured.

We are not suggesting by this opinion that there may never be an appropriate instance where the carrier may seek declaratory relief prior to the insured's liability being ascertained. There may, indeed, be situations where the language of the policy is such that the carrier's obligation to pay can be determined even before the insured's liability is determined. See, *Gottula v. Standard Reliance Ins. Co.*, 165 Neb. 1, 84 N.W.2d 179 (1957); *Hawkeye Casualty Co. v. Stoker*, 154 Neb. 466, 48 N.W.2d 623 (1951). For example, if insured's policy in this case was an automobile policy rather than a homeowner's policy, an injury caused by an assault and battery without the use of an automobile might not be covered. The insurer could then obtain a declaration that it has no liability, even now. But such is not the

case.

The basis for deferring the question of Allstate's obligation to pay on behalf of Novak appears to us to be proper. Were we to hold otherwise we would create the anomalous situation of requiring the insured under the terms of his policy, on the one hand, to cooperate with the insurer and provide the insurer with all the information concerning the events and then, on the other hand, require the insured to defend himself against the insurer who, by using the information provided it by the insured, seeks not only to absolve itself from any obligation to the insured but, in addition, seeks to establish the insured's liability to a third person.

Allstate would argue, however, that while this position may be generally true, our decision in *Jones v. Norval*, 203 Neb. 549, 279 N.W.2d 388 (1979), establishes that there is no coverage in any case involving an intentional assault and battery as a matter of law. We do not read the *Jones* case to extend that far.

In *Jones* there was a final determination that the insured was liable for a willful and intentional assault. Specifically, we said in *Jones* at 552, 279 N.W.2d at 391: "'Where an intentional act results in injuries which are the natural and probable consequences of the act, the injuries as well as the act are intentional.'" We then went on to hold that where the evidence was without dispute that the insured intentionally hit another person in the face with his fist, with force enough to knock the person unconscious, an intent to cause bodily injury could be inferred as a matter of law. Our holding in *Jones*, however, must be viewed in light of our holding in *Muth*, wherein we affirmed the trial court's finding that when the insured's son caused a gun to discharge in the direction of the injured party, he did not intend nor expect to do bodily injury to the individual. In the *Muth* case we held that the exclusionary provision of the policy did not apply and that the company was obligated to make payment because, while the firing of the gun by the child was intentional, the resulting injury was not

intentional but only negligent in that the child did not intend to strike his victim with the shot.

In the instant case there may indeed be either a complete defense to the action or a finding that while the act may be unlawful it was negligent and not intentional, thereby bringing the act within the coverage of the policy.

The California Supreme Court has specifically had an opportunity to analyze this problem when deciding the case of *Gray v. Zurich Insurance Co.*, 65 Cal. 2d 263, 419 P.2d 168, 54 Cal. Rptr. 104 (1966). In the *Gray* case, one Jones filed a complaint alleging that Dr. Gray "wilfully, maliciously, brutally and intentionally assaulted him" and therefore prayed for substantial damages. Gray argued that he acted in self-defense and requested that the company defend him. The carrier maintained that it did not need to defend Gray because the complaint revealed on its face that the claimed bodily injury did not fall within the indemnification coverage. Rejecting the carrier's position and finding that there was both a duty to defend and perhaps ultimately a duty to pay, the California Supreme Court, speaking through Justice Tobriner, said at 277, 419 P.2d at 177, 54 Cal. Rptr. at 113: "Jones' complaint clearly presented the possibility that he might obtain damages that were covered by the indemnity provisions of the policy. Even conduct that is traditionally classified as 'intentional' or 'wilful' has been held to fall within indemnification coverage. Moreover, despite Jones' pleading of intentional and wilful conduct, he could have amended his complaint to allege merely negligent conduct. Further, plaintiff might have been able to show that in physically defending himself, even if he exceeded the reasonable bounds of self-defense, he did not commit wilful and intended injury, but engaged only in nonintentional tortious conduct."

In fact, Novak maintains that he acted in self-defense. If, indeed, the jury believes that he acted in self-defense his action in striking Stewart might be excused or at

least held to be negligent but not expected or intended.

A similar situation was presented to the California Court of Appeals in the case of *Walters v. American Ins. Co.*, 185 Cal. App. 2d 776, 783, 8 Cal. Rptr. 665, 670 (1960), where the court there noted: "'A "wilful act" as used in this statute connotes something more blameworthy than the sort of misconduct involved in ordinary negligence, and something more than the mere intentional doing of an act constituting such negligence.' A contention that it meant simply an act performed intentionally was rejected. If plaintiff acted in self-defense then although he 'intended the act,' plaintiff acted by chance and without a preconceived design to inflict injury just as though he were acting intentionally, although negligently, and injured someone."

"It is now settled that injuries resulting from acts committed by an insured in self-defense are not 'intended' or 'expected' within the meaning of those terms as customarily used in an exclusionary clause like the one involved in the present case." *Mullen v. Glens Falls Ins. Co.*, 73 Cal. App. 3rd 163, 170, 140 Cal. Rptr. 605, 609 (1977). See, also, *Walters v. American Ins. Co.*, *supra*; *Lowell v. Maryland Casualty Co.*, 65 Cal. 2d 298, 419 P.2d 180, 54 Cal. Rptr. 116 (1966); *Meyer v. Pacific Employers Ins. Co.*, 233 Cal. App. 2d 321, 43 Cal. Rptr. 542 (1965). In *Mullen v. Glens Falls Ins. Co.*, *supra* at 171, 140 Cal. Rptr. at 610, the court there went on to note as follows: "It is possible that an act of the insured may carry out his 'intention' and also cause unintended harm. [Citations omitted.] Self-defense is an excellent example. [Citations omitted.] Further, an insured might be able to show that in physically defending himself, even if he exceeded the reasonable bounds of self-defense, he did not commit willful and intended injury, but engaged only in nonintentional tortious conduct."

The cases, as evidenced by those already cited, point out that when one acts in self-defense the actor is not generally acting for the purpose of intending any injury

to another but, rather, is acting for the purpose of attempting to prevent injury to himself. It can easily be said that such act, though resulting in bodily injury to another, was neither expected nor intended within the terms of the policy. What was expected or intended was that there be no injury to the actor. It appears clear to us that unless and until a final determination is in fact made that Novak is legally obligated to pay and the basis for that obligation is determined, the question of Allstate's obligation to pay on behalf of Novak cannot be decided. An injury resulting from an act committed by an insured in self-defense is not, as a matter of law, an expected or intended act within the meaning of a policy of insurance exempting bodily injuries or property damages which are either expected or intended from the standpoint of the insured.

That leaves us then with but one further question to resolve. That question is whether Allstate has an obligation to defend Novak and, if so, how and when that obligation is determined. It would appear to follow, in the natural course of events, that because of what we have said concerning Allstate's possible obligation to pay in this case, when viewed in light of Allstate's contractual duty to defend even false, fradulent, or groundless suits, Allstate does have an obligation to defend this case even though it may not ultimately have an obligation to pay. Allstate would argue that it has no duty to defend because the petition filed by Stewart against Novak shows on its face that it is a suit based upon assault and battery and therefore outside the terms of the policy. There are cases that can be found, including cases within our own jurisdiction, which say that the insurer may look only to the petition or complaint to determine whether it has an obligation to defend, and if the complaint or petition on its face alleges facts which bring the action within an exclusion of the policy there is no obligation to defend. We believe that those cases are not based upon sound reasoning nor recognize the reality of today's litigation. A plaintiff may plead

anything he desires. Should we then leave the insured to his own defense based upon what the suing party claims, or should we require the carrier to examine all the facts to determine whether there is the possibility of coverage under the policy? We believe that the better reasoned cases support the latter view and are correct. In *Gray v. Zurich Insurance Co.*, 65 Cal. 2d 263, 276-77, 419 P.2d 168, 176-77, 54 Cal. Rptr. 104, 112-13 (1966), the California court noted: "To restrict the defense obligation of the insurer to the precise language of the pleading would not only ignore the thrust of the cases but would create an anomaly for the insured. . . .

"Since modern procedural rules focus on the facts of a case rather than the theory of recovery in the complaint, the duty to defend should be fixed by the facts which the insurer learns from the complaint, the insured, or other sources. An insurer, therefore, bears a duty to defend its insured whenever it ascertains facts which give rise to the potential of liability under the policy. In the instant case the complaint itself, as well as the facts known to the insurer, sufficiently apprised the insurer of these possibilities; hence we need not set out when and upon what other occasions the duty of the insurer to ascertain such possibilities otherwise arises."

To the same effect see *Healy Tibbitts Const. Co. v. Foremost Ins. Co.*, 482 F. Supp. 830 (N.D. Cal. 1979).

To hold otherwise would be to totally ignore the reality of the situation. The insured's basis for defending may involve an affirmative defense such as in the instant case, which can only be raised in the answer. To therefore suggest that the carrier only looks to the petition and ignores the fact that there is a justifiable, valid, and legal defense to the claim would be to entrust a third party with the determination of whether the insured should get that which the insured bargained for and which the insured is entitled to receive, to wit, a defense. We would not support such a view. We perceive of no reason why the carrier might be required to defend a false, fraudulent, or groundless suit but not be

required to defend a suit in which the insured has a valid defense. We therefore believe that the position taken by the California court requiring the insurer to not only view the petition but to likewise make investigation and ascertain facts from all available sources in order to determine its obligation to defend is the more appropriate rule. An insurer has a duty to defend its insured whenever it ascertains facts which give rise to the potential of liability under the policy. The insurer may not confine its investigation to the allegations of the petition filed by the party claiming damages.

Based upon the evidence presented to us at this juncture, it appears clear that the insured may have a valid defense or may only be liable for negligence. In either event the action would be covered by the policy, and therefore the carrier has a duty to defend.

The judgment of the trial court is reversed and remanded with instructions to enter a judgment in accordance with this opinion.

REVERSED AND REMANDED WITH INSTRUCTIONS.

LOUIS RODRIGUEZ, JR., APPELLEE, V. GOVERNMENT EMPLOYEES INSURANCE COMPANY, APPELLANT.

313 N.W.2d 642

Filed December 18, 1981. No. 43602.

1. **Contracts: Insurance.** Contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous, their terms are to be taken and understood in plain, ordinary, and popular sense.
2. ____: ____. Where the language is plain and unambiguous, the court will not read an ambiguity into the language in order to construe it against the one who prepared the contract.
3. ____: ____. Construction of a contract of insurance ought not to be employed to make a plain agreement ambiguous for the purpose of interpreting it in favor of the insured.

4. **Contracts: Insurance: Motor Vehicles.** An operable automobile which is being driven, albeit unlicensed, is an automobile owned by the insured under the automatic coverage provisions of the standard automobile liability insurance policy.

Appeal from the District Court for Nance County: JOHN C. WHITEHEAD, Judge. Reversed and remanded with directions.

Kenneth H. Elson for appellant.

Morgan & Morgan for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and HASTINGS, JJ.

HASTINGS, J.

Louis Rodriguez, Jr., commenced this action by filing a petition for a declaratory judgment seeking a determination that a 1972 Fiat automobile which he was driving on August 22, 1976, when he was involved in an accident, was an "owned automobile" within the coverage provisions of either of two policies of insurance previously issued to him by the defendant, Government Employees Insurance Company. The defendant responded with a cross-petition seeking a ruling to the contrary. The District Court found generally for the plaintiff and entered judgment against the defendant insurance company, the effect of which was to determine that the Fiat automobile was within the coverage of these policies. Government Employees has appealed and we reverse.

Rodriguez had purchased the Fiat a few days prior to the accident and he had made no attempt to notify his insurance company of this fact until after the accident had occurred.

At the time of his purchase of the Fiat, plaintiff owned three other automobiles. Of these three cars only a 1969 Chrysler and a 1968 Chrysler had been declared by him to his insurance company and were named on his policies. He admitted that a third automobile owned by him, a 1969 Chrysler New

Yorker, had never been insured under any policy issued by Government Employees. That latter automobile was operable and drivable and, according to plaintiff's own brief, was driven at most once a week, although it was never licensed in accordance with the laws of the State of Nebraska.

Each of the policies issued by defendant provided coverage for "owned automobiles." This term is defined by the policies to include: "(a) a private passenger . . . automobile described in this policy for which a specific premium charge indicates that coverage is afforded . . . (c) a private passenger . . . automobile ownership of which is acquired by the named insured during the policy period, provided . . . (2) the company insures all private passenger . . . automobiles owned by the named insured on the date of such acquisition and the named insured notifies the company within 30 days after the date of such acquisition of his election to make this and no other policy issued by the company applicable to such automobile, or (d) a temporary substitute automobile . . . ."

The sole issue with respect to the terms of the policy is whether defendant insured "all automobiles owned by the named insured" on the date that plaintiff purchased the 1972 Fiat. We find that defendant did not, and therefore conclude that the 1972 Fiat was not an insured "owned automobile" within the terms of the policies at the time of the accident.

This court has held on numerous occasions that "contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous, their terms are to be taken and understood in plain, ordinary, and popular sense." *Sampson v. State Farm Mut. Ins. Co.*, 205 Neb. 164, 167, 286 N.W.2d 746, 749 (1980). See, also, *Dairyland Ins. Co. v. Esterling*, 205 Neb. 750, 290 N.W.2d 209 (1980); *Hammond v. Nebraska Nat. Gas Co.*, 209 Neb. 616, 309 N.W.2d 75 (1981).

It is equally well settled that "an insurance contract will be interpreted in accordance with the reasonable expectations of the insured at the time of the contract, and in case of doubt, the policy will be liberally construed in favor of the insured." *Dairyland* at 752-53, 290 N.W.2d at 211. "'The language should be considered not in accordance with what the insurer intended it to mean but what a reasonable person in the position of the insured would have understood it to mean.'" *Hammond* at 624-25, 309 N.W.2d at 81. See, also, *Wyatt v. Woodmen Acc. & Life Co.*, 194 Neb. 614, 234 N.W.2d 217 (1975).

Plaintiff would have the court apply these rules of construction to clause (c)(2) of the policies to reach a conclusion that "all automobiles owned by the named insured" does not include an unlicensed automobile owned by the insured. This we cannot do, for "[w]here the language is plain and unambiguous, the court will not read an ambiguity into the language in order to construe it against the one who prepared the contract." *Sampson* at 167, 286 N.W.2d at 749. Furthermore, "it is imperative that the contract made by the parties shall be respected and that a new contract is not interpolated by construction. Construction ought not to be employed to make a plain agreement ambiguous for the purpose of interpreting it in favor of the insured." *Wyatt* at 617-18, 234 N.W.2d at 220. The policies involved herein are plain and unambiguous and need no construction.

While this court has never been called upon to apply this particular "automatic coverage" clause in an automobile insurance policy, the matter has been adjudicated in several other jurisdictions. *Luke v. American Family Mutual Insurance Company*, 325 F. Supp. 1330 (D. S.D. 1971), *aff'd* 476 F.2d 1015 (8th Cir. 1972); *Manns v. Indiana Lum. Mut. Ins. Co. of Indianapolis*, 482 S.W.2d 557 (Tenn. App. 1971); *Lambert v. Alabama Farm Bureau Mut. Cas. Ins. Co.*, 281 Ala. 196, 200 So. 2d 656 (1967); *Trippel v. Dairy-*

land Mut. Ins. Co., 2 Wash. App. 318, 467 P.2d 862 (1970); *Harshbarger v. Ins. Co.*, 40 Ohio App. 2d 296, 319 N.E.2d 209 (1974); *Palmer v. State Farm Mut. Auto. Ins. Co.*, 614 S.W.2d 788 (Tenn. 1981).

These cases have resulted in a general proposition that the language "'"all . . . automobiles owned by the named insured" . . . "does not contemplate a vehicle which is in such a position or condition that a reasonable person would not include it in a policy of public liability insurance."'" *Luke* at 1018. See, also, 6B Appleman, Insurance Law and Practice § 4293 (1979). A slightly broader rule can be found in *Manns* at 562, wherein the court found: "An automobile which has been retired from use as a vehicle of transportation, even if it is in operable condition, is not an automobile within the meaning of the liability policy sued on in this case." Under neither rule, however, has a court gone so far as to exclude an operable automobile and one which is being driven, albeit unlicensed, from inclusion within the phrase "all automobiles owned."

Manns can be distinguished from the present case in several respects. The vehicles involved in that case included two automobiles, one of which had not been driven in 5 years and another that had not been operated in several months prior to the accident involving the insured. Furthermore, the owner stated that the vehicles were "worn out" and the insurer admitted that they had been made aware of the fact that the vehicles were inoperable and no longer in use at the time the policies were sold to the insured. These facts not only distinguish *Manns* from the present case, they also show that the rule of the case is much broader than the facts can support. Such a broad statement of the law is not attractive to this court and will not be adopted.

Lambert is more applicable to the present set of facts. Therein the court found the "all automobiles owned" language of the policy was unambiguous and required the inclusion of an unlicensed auto which was inop-

erable only because of a missing battery.

This court is similarly inclined to find that the language in the policies in question is unambiguous and should be given its plain, ordinary, and popular sense. Rodriguez has admitted that the 1969 Chrysler New Yorker was drivable and operable. The fact that it was unlicensed does not make it anything other than an unlicensed automobile. It remains an automobile by definition and clearly falls within the plain meaning of the phrase "all automobiles owned by the named insured."

"An insurance policy is a contract between the insurance company and the insured. As such, the insurance company has the right to limit its liability by including those limitations in the policy definitions. If those definitions are clearly stated and unambiguous, the insurance company is entitled to have those terms enforced." *Great Plains Ins. Co., Inc. v. Kalhorn*, 203 Neb. 799, 803-04, 280 N.W.2d 642, 645 (1979).

It is undisputed that the 1969 Chrysler New Yorker, as an "automobile owned by the insured," was not insured under a policy issued by the defendant at the time the 1972 Fiat was acquired by the plaintiff. Therefore, the Fiat does not meet the clear and unambiguous definition of an "owned automobile" and was not included within the automatic coverage provisions of either of the policies involved in this action at the time of the accident. The District Court should have entered judgment in favor of the defendant declaring that its policies of insurance did not afford coverage to the plaintiff for the accident in which the latter was involved while driving the Fiat automobile.

The judgment of the District Court is reversed and the cause is remanded with instructions to enter judgment consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

WHITE, J., participating on briefs.

LANGE BUILDING AND FARM SUPPLY, INC.,
A CORPORATION, APPELLANT, V.
OPEN CIRCLE "R", INC., A CORPORATION, APPELLEE.

313 N.W.2d 645

Filed December 18, 1981. No. 43633.

Appeal from the District Court for Buffalo County: DEWAYNE WOLF, Judge. Reversed and remanded for further proceedings.

Knapp, Mues, Sidwell, Anderson & Shofstall for appellant.

Nye, Hervert, Jorgensen & Watson, P.C., for appellee.

Heard before KRIVOSHA, C.J., WHITE, and HASTINGS, JJ., and GITNICK, District Judge, and COLWELL, Retired District Judge.

GITNICK, District Judge.

This is an action by plaintiff, Lange Building and Farm Supply, Inc., to recover for breach of contract of a written agreement for the repair of a grain bin, in its first cause of action, and to recover money for the partial installation of improvements on another grain bin under an oral contract, in its second cause of action. At the conclusion of plaintiff's evidence, the lower court sustained the defendant's motion for a directed verdict for the reasons that there was no evidence to establish any contractual relationship in either cause of action between the plaintiff and the defendant corporation, and that if the evidence established any contracts at all, they were between the plaintiff and the president of the defendant corporation in his individual capacity.

The assignment of error on appeal is that the trial court erred in directing a verdict for the defendant.

The principles of law applicable at this posture of the case are that a "'party against whom a motion to dismiss is made is entitled to have every controverted fact

resolved in his favor and to have the benefit of every inference that can reasonably be drawn from the evidence, and if there is any evidence which will sustain a finding for the plaintiff, it may not be disregarded and the case decided as a matter of law.'" *Beebe v. Sorensen Sand & Gravel Co.*, 209 Neb. 559, 566, 308 N.W.2d 829, 833 (1981), quoting from *Omaha Nat. Bank v. Omaha P.P. Dist.*, 186 Neb. 6, 180 N.W.2d 229 (1970).

In the case of *Foremost Ins. Co. v. Allied Financial Services, Inc.*, 205 Neb. 153, 158, 286 N.W.2d 740, 744 (1980), we stated: "It is only when the facts are conceded, undisputed, or are such that reasonable minds can draw but one conclusion therefrom that the trial court must decide the question as a matter of law and not submit it to a jury. [Citations omitted.] It is also the rule that to justify the direction of a verdict, it is not necessary that there should be literally no evidence to go to the jury, it being sufficient that there is none that ought reasonably to satisfy the jury that the fact sought to be proved is established." (Emphasis omitted.) We have further stated: "It is a well-established rule that if there is any evidence which will sustain a finding for the litigant having the burden of proof in a cause the trial court may not disregard it and decide the case as a matter of law." *Hickman v. Parks Construction Co.*, 162 Neb. 461, 470, 76 N.W.2d 403, 410 (1956).

The question, then, to be addressed in reviewing the action of the trial court in this case is whether the evidence adduced by the plaintiff, viewed most favorably in support of plaintiff's position, is such that reasonable minds could reach only the one conclusion that the defendant, Open Circle "R", Inc., a corporation, was not in any manner a party to the contracts sued upon. If reasonable minds could dispute this conclusion, then a directed verdict would not be appropriate.

We first consider the question of whether the trial court should have dismissed plaintiff's first cause of action against the defendant.

Plaintiff's first cause of action in essence alleged that "the plaintiff and defendant entered into a written agreement" for the repair of defendant's grain storage bin under a written agreement attached to the plaintiff's petition, and that plaintiff commenced making the contracted repair but was ordered by the defendant to cease work, resulting in a breach of the parties' written agreement.

The defendant corporation filed an amended answer and cross-petition in which it generally denied the allegation of plaintiff's first cause of action that the defendant corporation had entered into the aforesaid written agreement, but then specifically pleaded that "the Plaintiff and Defendant entered into an agreement for the repair of the Defendant's Eaton metal grain storage bin," and incorporated and attached the same contract as was incorporated and attached to plaintiff's pleading.

This recitation becomes important because there is no other evidence in the record bearing upon the involvement of the defendant corporation in this transaction, except for a brief series of questions and answers in the record as follows:

"Q Mr. Lange, in the course of your business, have you had occasion to furnish materials and labor and otherwise do some work for Mr. Robert Cruise for his family farm corporation Open Circle "R"?

"A Yes, we had constructed a similar bin of that nature, I believe, in 1977, the summer of 1977.

"Q Let me get this straight. We've talked this morning in opening statements about a grain bin. You're telling me now in your testimony that at some time in 1976, you constructed a grain bin for Mr. Cruise, is that correct?

"A That is correct.

"Q That's not the grain bin that's in question in this lawsuit, is it?

"A No, that is correct.

"Q Since the erection of that particular grain bin,

have you had occasion to do any work for Mr. Cruise and his corporation?

"A Not other than what is under litigation here today."

All other testimony concerning the identity of the contracting party who hired the work done specified Mr. Cruise, the president of the defendant corporation, in his individual capacity only.

In this state of the record, we believe that the evidence introduced as part of plaintiff's case in chief and as set forth in the pleadings raises a legitimate fact question as to the liability of the defendant corporation which should have been submitted to the jury for its resolution. We come to this conclusion in favor of the plaintiff for the reason that there is an inference from the testimony that the work was done for the defendant corporation based upon the quoted testimony, *supra*, and for the further reason that the defendant has judicially admitted in its amended answer that the same contract sued upon by the plaintiff existed between the plaintiff and the *defendant corporation.* While the defendant contends this written agreement is a different one because of oral modifications made to it, factually it is the exact same written document. "An admission in a plea or answer is binding on the party making it; such an admission is a conclusive or judicial admission, and is not merely evidence. The admission is conclusive as to the admitted fact, and no evidence may be shown to contradict it." 71 C.J.S. *Pleading* § 160 at 334 (1951).

We previously stated in the case of *Bonacci v. Cerra*, 134 Neb. 476, 481-82, 279 N.W. 173, 175-76 (1938), that: "Wigmore states the rule applicable and controlling under the circumstances here presented, as follows:

'The pleadings in a cause are, for the purposes of use in that suit, not mere ordinary admissions, * * * but judicial admissions * * * i.e., they are not a means of evidence, but a waiver of all controversy (so far as the

opponent may desire to take advantage of them) and therefore a limitation of the issues. Neither party may dispute beyond these limits. Thus, any reference that may be made to them, where the one party desires to avail himself of the other's pleading, is not a process of using evidence, but an invocation of the right to confine the issues and to insist on treating as established the facts admitted in the pleadings.

'This much being generally conceded, it follows that a party may at any and all times invoke the language of his opponent's pleading on that particular issue as rendering certain facts indisputable; and that, in doing this, he is on the one hand neither required nor allowed to offer the pleading in evidence in the ordinary manner, nor on the other hand forbidden to comment in argument without having made a formal offer; for he is merely advocating a construction of the infra-judicial act of waiver of proof.' 2 Wigmore, Evidence (2d ed.) sec. 1064." (Emphasis omitted.)

We reiterated this same position in *Barkalow Bros. Co. v. English*, 159 Neb. 407, 414-15, 67 N.W.2d 336, 341 (1954).

We further point out what we have previously said in *Sleezer v. Lang*, 170 Neb. 239, 252, 102 N.W.2d 435, 444 (1960): "'A party may at any time invoke the language of the pleading of his adversary on which the case is tried on a particular issue as rendering certain facts indisputable; and in so doing he is neither required nor permitted to offer the pleading in evidence. * * * An admission made in a pleading on which the trial is had is more than an ordinary admission. It is a judicial admission and constitutes a waiver of all controversy so far as the adverse party desires to take advantage of it, and is therefore a limitation of the issues.'" We have also stated: "It is an elementary rule of pleading that matters admitted by the pleadings need not be proved." *Peitz v. Hausman*, 198 Neb. 344, 346, 252 N.W.2d 628, 630 (1977).

We next consider whether the trial court should have

dismissed plaintiff's second cause of action.

Plaintiff's second cause of action alleged that the plaintiff and the defendant entered into an oral agreement whereby the plaintiff was to install certain improvements on a second grain storage bin of the defendant's for an agreed sum, which work was completed but was not paid for by the defendant.

The defendant admitted the oral agreement covering the same work and the completion of that work by the plaintiff. It contended the contract price was for a different amount, however. The basic fact again stands as admitted, that the oral contract sued upon was between the plaintiff and the defendant corporation. In this state of the record, the same considerations apply as are cited, *supra*, regarding our disposition of the lower court's action as to the first cause of action.

We therefore reverse the action of the trial court in dismissing plaintiff's petition, and remand the matter for further proceedings.

REVERSED AND REMANDED
FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V. CHARLES JESS PALMER, ALSO KNOWN AS CHARLES TINSLEY, ALSO KNOWN AS J. R. KIRKPATRICK, APPELLANT.

313 N.W.2d 648

Filed December 18, 1981. No. 43708.

1. **Arrest.** The legality of an arrest is, within constitutional limits, governed by the law of the state where the arrest takes place.
2. **Criminal Law: Hypnosis.** Until hypnosis gains acceptance to the point where experts in the field widely share the view that memories are accurately improved without undue danger of distortion, delusion, or fantasy, a witness who has been previously questioned under hypnosis may not testify in a criminal proceeding concerning the subject matter

adduced at the pretrial hypnotic interview. This holding does not exclude otherwise admissible evidence, leads to which were obtained during an hypnotic interview.

Appeal from the District Court for Hall County: LLOYD W. KELLY, JR., Judge. Reversed and remanded for further proceedings in accordance with this opinion.

John A. Wolf and Jerry J. Milner for appellant.

Paul L. Douglas, Attorney General, and J. Kirk Brown for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

MCCOWN, J.

The defendant was found guilty by a jury on a charge of murder in the perpetration of a robbery. Following a sentencing hearing, a three-judge panel imposed the death penalty.

Eugene Zimmerman operated a coin shop located on the first floor of his residence in Grand Island, Nebraska. On March 6, 1979, at approximately 5 p.m., Zimmerman's wife, Monica, returned to the house and discovered that the coin shop had been looted and her husband was missing from the shop. She called the police who arrived in 2 or 3 minutes. Eugene Zimmerman's body was found in an upstairs bedroom. He had been strangled with an electric cord. Cash, coins, jewelry, and other items were missing from the coin shop and from the residential portions of the house, including jewelry the victim had been wearing. The time of death was later established as approximately 4:30 p.m.

On March 22, 1979, Jesse Garza, a coin dealer in Austin, Texas, purchased a number of gold and silver coins and pieces of antique jewelry from a man who represented himself to be a visitor in Austin. On March 27, 1979, Garza read an article in a trade journal which reported Zimmerman's death, identified

many of the articles which had been stolen, and requested coin dealers to be on the lookout for the stolen items. The items Garza had purchased on March 22nd appeared to be some of the items described in the article. He contacted the Austin, Texas, police department at approximately 2 p.m., reported his information, and was told to stall the person from whom he had purchased the items if he was contacted again. The police began an immediate investigation, interviewed Garza at his shop, verified the information, and returned to the police station at about 3:30 p.m.

Later in the afternoon of March 27th the man telephoned Garza seeking to sell more items, and he and Garza arranged to meet at the Austin airport. Garza again contacted the police at approximately 4:45 p.m., and the police accompanied him to the airport where the defendant was arrested at approximately 6 p.m. Various items in the defendant's possession at the airport were seized. Those items, as well as the items sold to Garza on March 22, 1979, were identified as having been taken from the Zimmerman house.

At trial Deanna Klintworth testified that at approximately 4:30 p.m. on March 6, 1979, as she and her husband drove past the Zimmerman house in Grand Island, Nebraska, she saw a tall man and a woman walking away from the house. The man was carrying a baby. She was unable to recall any further details.

Jim Mracek, the manager of a 7-Eleven store across the street from the Zimmerman residence, testified that on March 6, 1979, he saw Zimmerman in the Mracek store with a man, woman, and baby. Mracek testified that the man with Zimmerman was not the defendant. Initially he identified Cherie Palmer, the defendant's wife, as the woman, but later testified that he was unable to state that she was the woman he saw in his store on March 6, 1979. Zimmerman and the couple did not come into the store together. The couple drove a dark sedan with out-of-state plates.

Monica Zimmerman testified that the defendant,

his wife, and baby had been at the Zimmerman house on several occasions prior to March 6, 1979, to transact business with Eugene Zimmerman. On these occasions either the defendant or his wife had sold coins or other objects to Zimmerman. The last time she saw the three at the Zimmerman house was on Friday evening, March 2, 1979, at which time Cherie Palmer was offering five gold rings for sale. Monica Zimmerman also identified a pickup truck driven by the defendant at the time of his visits to the Zimmerman residence. She also described the physical layout of the Zimmerman residence and the physical arrangements in the area used for the coin business. She described and identified the items missing from the Zimmerman home on the day of the murder, as well as the sequence of events leading to the discovery of her husband's body.

The State's evidence showed that a "C. Palmer" was issued an equipment violation ticket in the early afternoon of March 6, 1979, at a highway intersection 9 miles south of Hastings, Nebraska, at a State Patrol equipment check point. Neither a ticket nor a copy was produced and the trooper could neither identify anyone to whom he had issued a ticket nor state in which direction the vehicle was traveling. The intersection was at a point approximately halfway between Grand Island, Nebraska, and Guide Rock, Nebraska, where the defendant was living at the time.

The defendant and his wife had lived in Guide Rock, Nebraska, since August 1977. Their baby was born July 4, 1978. The defendant was employed at a dog farm in Guide Rock. The owners were vacationing in Florida during February and March of 1979, but conversed with the defendant periodically by telephone. The defendant called them the last time on March 18, 1979. On March 19, 1979, the defendant arranged with a neighbor to take care of the dogs and the defendant and his family left Guide Rock on March 19 or 20, 1979.

The defendant did not testify at the trial and the jury

was appropriately instructed regarding that fact. The jury found the defendant guilty and a three-judge panel imposed a death sentence. This appeal followed.

Prior to trial the defendant filed a motion to suppress the items seized from the defendant's person at the time of his arrest. Defendant also filed a motion and amended motion in limine to suppress all testimony from Monica Zimmerman, Deanna Klintworth, and Jim Mracek upon the ground that their testimony was obtained by the State under hypnosis at a pretrial hypnotic interview. The trial court, after hearings, denied the motion to suppress evidence. The court also denied the motion to exclude the testimony of hypnotized witnesses, except that the court did exclude any testimony given while under hypnosis by the three witnesses. The District Court's rulings on those motions constituted the basic assignments of error on this appeal.

The defendant contends that his arrest in Texas without a warrant was unlawful under the law of Texas, and consequently the items seized from him at the time of his arrest are inadmissible. The State contends that Nebraska law applies to the arrest; that under Nebraska law the arrest was lawful; and that in any event the District Court was correct in holding that a valid warrantless arrest was made.

The District Court found that a valid warrantless arrest was made under the laws of Texas and the necessary exigent circumstances existed, and overruled the motion to suppress.

State v. Wilson, 199 Neb. 765, 261 N.W.2d 376 (1978), is dispositive of the issue as to whether the law of Texas or of Nebraska is to be applied to determine the validity of the arrest. That case held that the legality of an arrest is, within constitutional limits, governed by the law of the state where the arrest takes place. In the case now before us the statutory law of Texas was properly introduced into evidence and the substantive law of Texas was properly applied by the

District Court.

The defendant does not dispute the fact that the Texas police officers had probable cause for the arrest by 3:30 p.m. on March 27, 1979, after they had interviewed Garza, examined and identified the items purchased by Garza from the defendant, and had verified additional information as to the murder of Zimmerman and the robbery in Grand Island, Nebraska, by telephone to the Grand Island Police Department. When Garza again telephoned the Texas police at approximately 4:30 p.m. and told them of the planned meeting with the defendant at the airport, they left the police station approximately 20 minutes later and accompanied Garza to the airport where the arrest followed. The defendant now contends that the police had ample time to obtain an arrest warrant and that none of the statutory exceptions to the requirement of a warrant applied.

Texas statutes dealing with an arrest without a warrant contain specific provisions authorizing warrantless arrests under certain circumstances. See, Tex. Code Crim. Proc. Ann. art. 14.01 through 14.04 (Vernon 1977). Article 14.01 authorizes a peace officer to arrest an offender without a warrant for any offense committed in his presence or within his view. Article 14.04 provides that where it is shown by satisfactory proof to a peace officer, upon the representation of a credible person, that a felony has been committed, and that the offender is about to escape, so that there is no time to procure a warrant, such peace officer may, without warrant, pursue and arrest the accused.

Under the circumstances reflected by this record it is quite clear that the police officers had probable cause for arrest of the defendant but did not know his whereabouts at the time, except that he was meeting Garza at the airport. They not only had probable cause to arrest him for a prior crime or crimes, but they had probable cause to believe that he would have stolen

property on his person at the time of arrest. Although there may have been some question as to whether there was sufficient time to procure a warrant, a meeting at an airport indicates the possibility of immediate flight. There can be no question that the defendant was in possession of stolen property at the time of his arrest, however, and that that offense was committed in the presence of the officers.

Even if the statutory exceptions in article 14 were inapplicable, the arrest under Texas law was also validated under Tex. Code Crim. Proc. Ann. art. 18.16 (Vernon 1977). That section provides: "All persons have a right to prevent the consequences of theft by seizing any personal property which has been stolen and bringing it, with the supposed offender, if he can be taken, before a magistrate for examination, or delivering the same to a peace officer for that purpose. To justify such seizure, there must, however, be reasonable ground to suppose the property to be stolen, and the seizure must be openly made and the proceedings had without delay." Under that statute the Texas court has held that an officer must have probable cause to arrest under the statute but that no warrant need be obtained. See *Lewis v. State*, 598 S.W.2d 280 (Tex. Crim. App. 1980).

In the case at bar the evidence establishes, and the defendant does not contest, that the officers had probable cause to arrest the defendant. A valid warrantless arrest was made under the laws of Texas, and the District Court properly overruled the motion to suppress the evidence seized from the person of the defendant at the time of the arrest.

The defendant contends that the District Court erred in overruling defendant's motion in limine to suppress oral proffered testimony from Monica Zimmerman, Deanna Klintworth, and Jim Mracek, witnesses endorsed by the State. The grounds for the motion were that the State had placed the witnesses under hypnosis subsequent to the murder of Eugene Zimmerman;

that the party or parties placing the witnesses under hypnosis lacked sufficient qualifications and adequate training to conduct hypnosis; that by the hypnosis the witnesses were subjected to heightened suggestibility which tends to induce the witness to engage in fanciful, exaggerated, or incorrect versions of the facts; and that because of the hypnosis it is impossible to determine whether the witnesses' proferred testimony will be based on independent recollection of facts or is a product of and created by the hypnotic sessions conducted by the State. The final ground for the motion in limine was that hypnosis has not attained sufficient scientific and psychological accuracy for general recognition as being capable of definite and certain interpretation as to justify the admission of the testimony of the witnesses.

The District Court overruled the motion in limine, except that the court excluded any testimony given while under hypnosis by the three witnesses named in the motion in limine. At no time did anyone take a recorded or sworn statement as to what facts these three witnesses recalled prior to the hypnosis, and the hypnotic interviews took place from 3 to 6 days after the murder. However, a record was made of each of the three hypnotic sessions. The hypnotic session with Monica Zimmerman was conducted by Larry E. Williams, a criminal investigator for the Nebraska State Patrol. The hypnotic sessions with Deanna Klintworth and Jim Mracek were conducted by Blake Scott, an instructor at the Law Enforcement Training Center of the Nebraska State Patrol. Neither of the hypnotists had had any professional medical, psychiatric, or psychological education or training.

Williams' training in hypnosis consisted of a 4-day course in January 1979. He had conducted hypnotic sessions with approximately 20 different subjects, most of them classmates during his training session. The session with Monica Zimmerman was the third session he had conducted outside of class.

Scott's training in hypnosis consisted of the same 4-day course in January 1979. He had conducted hypnotic sessions approximately 70 times, virtually all of which were in classes. The hypnotic session he had with Deanna Klintworth was the second hypnotic session he had conducted in a criminal case.

The only information Williams and Scott had prior to the hypnotic sessions was received from police officers, and no statement was obtained by the hypnotists from the subjects prior to the hypnosis. A psychiatrist who had specialized in hypnosis for 20 years testified as an expert witness for the defendant at the hearing on the motion. He testified that there is a specific danger in hypnosis of an interviewer implanting suggestions in the subject's mind that become fixed so that the subject believes them to be true after hypnosis. He also testified that the interviewers' questions in specific areas of both the Zimmerman and Klintworth sessions were improperly suggestive. The trial court refused to permit the doctor to give his opinion as to whether the testimony of the witnesses at trial was suspect and unreliable.

The case at bar is a case of first impression in this jurisdiction as to the admissibility of the testimony of a previously hypnotized witness in a criminal proceeding concerning subject matter adduced at the pretrial hypnotic interview. The authorities agree that the problem is that hypnosis can create a memory of perceptions which did not previously exist and therefore bring forth a "memory" of events which were nonexistent but which may become fixed in the patient's mind so that he believes them to be true after hypnosis. Neither the person hypnotized nor an expert observer can distinguish between "confabulation" and accurate recall in any particular instance. Because the hypnotized subject is subjectively convinced of the veracity of the "memory," his recall is reinforced and virtually immune to attack by cross-examination.

In the past courts generally held that hypnosis affected only the credibility and not the admissibility of the witness' testimony. There were two lines of cases regarding hypnotically induced evidence. One line of cases excluded from evidence the exculpatory hypnotically induced testimony of criminal defendants and the other line of cases admitted the hypnotically induced testimony of prosecution witnesses. See, *Harding v. State*, 5 Md. App. 230, 246 A.2d 302 (1968), *cert. denied* 395 U.S. 949, 89 S. Ct. 2030, 23 L. Ed. 2d 468 (1969); *Greenfield v. Commonwealth*, 214 Va. 710, 204 S.E.2d 414 (1974). It is difficult to find any common thread in the prior cases dealing with the subject and difficult to find any logical basis for the distinctions made in the two lines of cases.

Recently, three cases have been decided which have developed different standards of admissibility for hypnotically induced evidence. In May 1980 the Supreme Court of Minnesota decided the case of *State v. Mack*, 292 N.W.2d 764 (Minn. 1980). The Minnesota court held that the results of hypnosis used to produce hypnotically induced "memory," like the results of mechanical or scientific testing, are not admissible unless the testing has developed or improved to the point where experts in the field widely share the view that the results are scientifically reliable as accurate. The court held that as to hypnosis used to retrieve memory the results are not yet scientifically reliable as accurate. The court held that a previously hypnotized witness could not testify in a criminal proceeding concerning subject matter adduced at a pretrial hypnotic interview.

In February 1981 the Supreme Court of Arizona decided the case of *State v. Mena*, 128 Ariz. 226, 624 P.2d 1274 (1981). The Arizona court held that until hypnosis gains acceptance in the fields of medicine and psychiatry as a method by which memories are accurately improved without undue danger of distortion, delusion, or fantasy, testimony of witnesses

who have been questioned under hypnosis regarding the subject matter of their offered testimony is inadmissible in criminal trials.

In July 1981 the Supreme Court of New Jersey decided the case of *State v. Hurd*, 86 N.J. 525, 432 A.2d 86 (1981). The New Jersey court held that hypnosis when used to restore a witness' memory can be considered reasonably reliable if it is able to yield recollections as accurate as those of an ordinary witness which likewise are often historically inaccurate. Hypnotically induced testimony may be admissible if the proponent of the testimony can demonstrate that the use of hypnosis in the particular case was a reasonably reliable means of restoring memory comparable to normal recall in its accuracy. The party seeking to introduce hypnotically refreshed testimony has the burden of establishing its admissibility by clear and convincing evidence. If testimony enhanced through hypnosis is admissible, the opponent may still challenge the reliability of the particular procedures followed in the individual case by introducing expert testimony at trial, but may not attempt to prove the general unreliability of hypnosis. The New Jersey court also held that in reviewing admissibility of hypnotically refreshed testimony, the trial court should evaluate the kind of memory loss that hypnosis was used to restore and the specific technique employed, based on expert testimony presented by the parties. The court also laid down specific requirements which must be met before a party may introduce hypnotically refreshed testimony in a criminal trial. Those requirements are: Psychiatrist or psychologist experienced in the use of hypnosis must conduct the session; the professional conducting the session should be independent of and not regularly employed by prosecutor, investigator, or defense; any information given to the hypnotist by law enforcement personnel or defense prior to hypnotic session must be recorded, either in writing or another suitable form;

before inducing hypnosis the hypnotist should obtain from the subject a detailed description of the facts as the subject remembers them; all contacts between hypnotist and subject must be recorded, including the preinduction interview, the hypnotic session, and the posthypnotic period; and only the hypnotist and the subject should be present during any phase of the hypnotic session.

In the case at bar the testimony of the three hypnotized witnesses concerning the subject matter adduced at the respective pretrial hypnotic interviews was inadmissible whether we adopt the basic holdings of the *Mack* and *Mena* cases or the holdings of the *Hurd* case. We believe the better rule to be that followed in the *Mack* and *Mena* cases.

To require the admissibility of hypnotically induced testimony to be determined on a case-by-case basis based on the testimony of expert witnesses produced by the parties, as required by *Hurd*, is neither sound nor practical. To compare the "recollections" of a witness whose testimony has been hypnotically induced to the "recollections" of an "ordinary" witness, and to determine whether the use of hypnosis was a feasibly reliable means of restoring memory comparable to normal recall in its accuracy, is virtually impossible.

The requirements for determining a minimum level of reliability for hypnotically induced testimony set out in *Hurd* are grounded upon the opinions and testimony of an eminent expert in the field of hypnosis. The same expert testified to essentially the same conclusions in the *Mack* case, and also testified that, in his opinion, a witness' testimony to a "memory" retrieved under hypnosis was infinitely less reliable as an indicator of truth than the results of a polygraph test. To base the admissibility of evidence in a given case on the testimony of competing expert witnesses imposes unjustified burdens on the criminal justice system in the field of hypnosis where the consensus of expert testimony indicates that no expert can determine whether

memory retrieved by hypnosis or any part of that memory is truth, falsehood, or fantasy.

We hold that until hypnosis gains acceptance to the point where experts in the field widely share the view that memories are accurately improved without undue danger of distortion, delusion, or fantasy, a witness who has been previously questioned under hypnosis may not testify in a criminal proceeding concerning the subject matter adduced at the pretrial hypnotic interview. Our holding does not exclude otherwise admissible evidence, leads to which were obtained during an hypnotic interview.

It should be noted that in this case a complete record of each hypnotic interview was made and was introduced at the hearing on the motion in limine. From that record the court, on retrial, may determine the subject matter adduced at the pretrial hypnotic interviews, and testimony of the witness as to that subject matter is inadmissible. Testimony as to other subjects may or may not be admissible.

In the present case the testimony now held to be inadmissible was clearly prejudicial, and reversal and remand for further proceedings is required. In view of the disposition made, it is unnecessary to discuss the defendant's remaining assignments of error.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

BRODKEY, J., concurs in the result.

CLINTON, J., concurring in the result.

I concur in the result. I agree that in the present state of informed knowledge the use of hypnosis as a "truth" determining device is in grave doubt. In this record the only evidence on that question indicates that it is not a reliable device for resurrecting hidden factual recollections of a witness. The State itself offered no testimony at all to establish the reliability of the procedure. I agree that the procedure should not be used in any future case unless reliability has been

established and an appropriate foundation laid.

I am uncertain as to the extent to which it will restrict the use of the hypnotized witness' testimony on the retrial of this case. The opinion excludes testimony which is the "subject matter" of the pretrial hypnotic interview. The term "subject matter" is not defined and the opinion offers no guidance to the trial court as to what it is to do on remand.

If, for example, on remand it can be reliably determined what the witness Monica Zimmerman remembered previous to and independently of the hypnotic session, then that testimony, in my judgment, would be admissible. If it cannot be reliably determined, then all testimony concerning the "subject matter" of the hypnotic interview must be barred.

BOSLAUGH and HASTINGS, JJ., join in this concurrence.

NORTHWEST HIGH SCHOOL DISTRICT NO. 82 OF HALL AND MERRICK COUNTIES ET AL., APPELLANTS, V. RAY HESSEL, HALL COUNTY ASSESSOR, ET AL., APPELLEES.

313 N.W.2d 656

Filed December 18, 1981. Nos. 43796, 43797, 43798.

1. **Statutes: Legislative Intent.** The legislative intent is the cardinal rule in the construction of statutes. All statutes relating to the same subject are considered as parts of a homogeneous system and later statutes are considered as supplementary to preceding enactments. Statutes relating to the same subject, although enacted at different times, are in pari materia and should be construed together.
2. **Municipal Ordinances: Schools and School Districts.** The annexation by a city of a contiguous subdivision effected by a resolution of the city council approving and accepting the plat of such subdivision in compliance with a subdivision ordinance duly adopted by the city under the authorization contained in Neb. Rev. Stat. § 19-916 (Reissue 1977), or its predecessor, constitutes a declaration of boundaries of the city by ordinance within the meaning of Neb. Rev. Stat. § 79-801 (Reissue 1976).

The date of the resolution of the city council approving and accepting such a subdivision is "the effective date of the city annexation ordinance" within the meaning of the proviso in § 79-801.

Appeal from the District Court for Hall County: LLOYD W. KELLY, JR., Judge. Affirmed.

Knudsen, Berkheimer, Beam, Richardson & Endacott for appellants.

Don Walters, Deputy Hall County Attorney, for appellees.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

MCCOWN, J.

In these three consolidated cases the plaintiffs sought to enjoin the county officials of Hall County, Nebraska, from detaching property contained in three different subdivisions of the city of Grand Island, Nebraska, from the plaintiff school district boundaries and attaching the property to the school district of the city of Grand Island, Nebraska, for purposes of taxation. The District Court dismissed plaintiffs' petition.

The three subdivisions involved in these cases were each annexed to the boundaries of the city of Grand Island, Nebraska, by three separate resolutions of the city council dated May 17, September 7, and October 18, 1976, respectively. Each resolution was adopted after all requirements of a 1968 subdivision ordinance had been complied with, and each resolution recited the approval and acceptance of the subdivision.

The three petitions in these cases were filed on August 15, 1980. They alleged that the city council of Grand Island, Nebraska, did not adopt an ordinance declaring each subdivision to be included within the boundaries of the city of Grand Island, but instead had done so by resolution. The petitions also alleged that the defendant county officials, on September 1, 1980, would, unless enjoined, detach the subdivision

properties from the plaintiff school districts and attach them to the school district of the city of Grand Island for purposes of taxation. Plaintiffs sought an injunction and equitable relief.

Temporary restraining orders were granted on August 22, 1980. Hearings were held on September 10, 1980, and on September 15, 1980, the District Court found there were insufficient grounds to grant the relief prayed for by the plaintiffs, dissolved the temporary restraining orders, and dismissed the petitions in the three cases. This appeal followed.

The plaintiffs contend that under applicable statutes of Nebraska only land annexed by contemporaneous ordinance becomes a part of the school district of the annexing city. Their position is that the annexations involved here were accomplished by resolutions only and not by ordinance and are therefore invalid and ineffective to change the boundaries of the respective school districts.

At this point reference needs to be made to relevant statutes and ordinances. Neb. Rev. Stat. § 79-801 (Reissue 1976) provides in part: "The territory embraced within the corporate limits of each incorporated city or village in the State of Nebraska, together with such additional territory and additions to such city or village as may be added thereto, as declared by ordinances to be boundaries of such city or village, having a population of more than one thousand and not more than fifty thousand inhabitants, including such adjacent territory as now is or hereafter may be attached for school purposes, shall constitute a school district of the third class and be known by the name of The School District of (name of city or village), in the county of (name of county), in the State of Nebraska."

Neb. Rev. Stat. § 19-916 (Reissue 1977) provides that the proprietor or proprietors of any land within or contiguous to any city of the first or second class or village may lay out an addition to the city or village. When a map or plat of the addition has been made out,

acknowledged, and certified in accordance with the statute, and has been approved by the local legislative body, "[a]ll additions thus laid out shall remain a part of the municipality and all additions laid out adjoining or contiguous to the corporate limits shall be included within the same and become a part of such municipality for all purposes whatsoever. . . . *Provided*, the local legislative body shall have power by ordinance to provide the manner, plan, or method by which land within the corporate limits of any such municipality, or contiguous to the same, may be subdivided, platted, or laid out . . . . No addition shall have any validity, right or privileges as an addition . . . unless the same be approved by the governing body and its approval endorsed thereon."

Neb. Rev. Stat. § 16-117 (Reissue 1977), which deals with the powers of annexation of cities of the first class, provides in part: "[T]he mayor and council may by ordinance . . . at any time, include within the corporate limits of such city any contiguous or adjacent lands, lots, tracts, streets, or highways as are urban or suburban in character . . . ."

Ordinance No. 4536 of the city of Grand Island was duly adopted on April 22, 1968. It provided the manner, plan, and method by which land within or contiguous to the corporate limits of the city could be subdivided. The ordinance contains 26 separate sections and multiple subsections and is published in pamphlet form.

Essentially, the ordinance specifies that if the subdivider has complied with the procedures outlined in the ordinance and the subdivision meets all the requirements of the ordinance, the subdivision shall be approved. Section 32-2 of the ordinance specifically provides: "Any plat of land contiguous to the corporate limits of the City shall be treated as an addition to the City as provided in Sec. 16-112 R.R.S. 1943." The relevant parts of that section and of present § 19-916 are the same.

The plaintiffs contend that under the language of

§ 79-801 only land annexed to a city by a contemporaneous ordinance becomes a part of the school district of the annexing city. They argue that the words "as declared by ordinances" limit the effect of the statute and that the later provisions of the section dealing with negotiation between school boards "within ninety days after the effective date of the city annexation ordinance" reinforce the conclusion that a resolution is not enough. They also argue that annexation under § 19-916 is accomplished under that statute and not by virtue of ordinances adopted under authorization of the statute, and therefore such annexation has no effect upon boundaries of affected school districts. We disagree.

The legislative intent is the cardinal rule in the construction of statutes. All statutes relating to the same subject are considered as parts of a homogeneous system and later statutes are considered as supplementary to preceding enactments. Statutes relating to the same subject, although enacted at different times, are in pari materia and should be construed together. *Matzke v. City of Seward*, 193 Neb. 211, 226 N.W.2d 340 (1975).

The general purpose of § 79-801 is not to prescribe a method by which a municipality can annex contiguous territory. Instead, it generally provides that as a city expands its boundaries, the boundaries of its school district expand also. Its purpose is to insure the continuity of city school districts, not to favor one method of annexation over another. In the case at bar ordinance No. 4536 is a complete act setting out the manner and method to be followed in annexing territory by subdivision approval. The specific approval of an individual subdivision, when all the requirements of the ordinance have been met, is merely a ministerial act and the annexation was accomplished in accordance with the ordinance, and the approval was in accordance with § 19-916.

Construing the statutes together, we hold that the annexation by a city of a contiguous subdivision effected by a resolution of the city council approving and accepting the plat of such subdivision in compliance with a

subdivision ordinance duly adopted by the city under the authorization contained in § 19-916, or its predecessor, constitutes a declaration of boundaries of the city by ordinance within the meaning of § 79-801. The date of the resolution of the city council approving and accepting such a subdivision is "the effective date of the city annexation ordinance" within the meaning of the proviso in § 79-801.

The judgment of the District Court was correct and is affirmed.

AFFIRMED.

CLINTON, J., concurs in the result.

STATE OF NEBRASKA, APPELLEE, V. LUCAS PERALES, APPELLANT.

313 N.W.2d 659

Filed December 18, 1981. No. 44292.

Appeal from the District Court for Scotts Bluff County: ALFRED J. KORTUM, Judge. Affirmed as modified.

James T. Hansen and Jonathan Pratter for appellant.

No appearance for appellee State.

Submitted without oral argument. KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

MCCOWN, J.

The defendant was convicted by a jury on a charge of possession with intent to distribute marijuana and sentenced to not less than 2 years' nor more than 4 years' imprisonment. The sole issue on appeal is whether or not the sentence was excessive.

The defendant was 49 years old at the time of the offense on October 22, 1980. He was single and lived by himself in a small two-room house on the rear of a residential lot where he had lived for several years. The

police obtained a search warrant and searched the house and found several sacks of marijuana which weighed 9 pounds at the time of the search and weighed 6½ pounds at the time it was examined by a chemist sometime later. None of the paraphernalia of trading in marijuana or other drugs was found in defendant's house. A witness testified that the quantity of marijuana found was more than would be required for the personal use of an individual. The defendant testified that he was not a user of marijuana or of other drugs, and also testified he knew nothing about the marijuana in his house but that he had given several friends permission to stay in the house. No one was present in the house when it was searched, but on the following morning the defendant went to the police station when he found the search inventory fastened on his door, identified himself to the police, and inquired what the inventory was about. At that time he was arrested and charged.

The defendant had lived in Scottsbluff for the past 46 years and had a misdemeanor record involving largely convictions and fines for intoxication or related offenses. His only jail sentence was in 1974 when he was sentenced to 30 days in the county jail for obtaining money under false pretenses. The defendant had worked at the Great Western sugar factory in season for the preceding 25 years, and at the time of the offense here was temporarily employed on a ranch some distance out of Scottsbluff.

The District Court, in sentencing the defendant, stated that to grant probation to the defendant would depreciate the seriousness of the crime. We accept that finding but are convinced that the circumstances do not warrant more than a minimum sentence. We, therefore, affirm the conviction but reduce the sentence to 1 year in an institution under the jurisdiction of the Department of Correctional Services. Defendant is to be given credit for time, if any, spent in custody pending trial and sentence.

AFFIRMED AS MODIFIED.

KRIVOSHA, C.J., concurring in part, and in part dissenting.

I find that while I concur with the majority of the court in affirming the conviction in this case, I must dissent from the majority's action in modifying the sentence imposed by the trial court. I believe that in doing so we unnecessarily add to the confusion. We have heretofore declared in a host of cases that this court will not reduce a sentence imposed by the trial court within statutory limits absent evidence of an abuse of discretion. See, *State v. Bosak*, 207 Neb. 693, 300 N.W.2d 201 (1981); *State v. Kelly*, 207 Neb. 295, 298 N.W.2d 370 (1980); *State v. Hortman*, 207 Neb. 393, 299 N.W.2d 187 (1980); *State v. Glover*, 207 Neb. 487, 299 N.W.2d 445 (1980); *State v. Janis*, 207 Neb. 491, 299 N.W.2d 447 (1980); *State v. French*, 206 Neb. 92, 291 N.W.2d 248 (1980); *State v. Weik*, 206 Neb. 217, 292 N.W.2d 289 (1980); *State v. Packett*, 206 Neb. 548, 294 N.W.2d 605 (1980); *State v. Tipton*, 206 Neb. 731, 294 N.W.2d 869 (1980); *State v. Crouch*, 205 Neb. 781, 290 N.W.2d 207 (1980); *State v. Kincaid*, 203 Neb. 495, 279 N.W.2d 152 (1979); *State v. Robinson*, 202 Neb. 210, 274 N.W.2d 553 (1979); *State v. Welsh*, 202 Neb. 249, 275 N.W.2d 54 (1979); *State v. Steed*, 201 Neb. 120, 266 N.W.2d 240 (1978); *State v. Freeman*, 201 Neb. 382, 267 N.W.2d 544 (1978); *State v. Brown*, 201 Neb. 536, 270 N.W.2d 318 (1978); *State v. Kerns*, 201 Neb. 617, 271 N.W.2d 48 (1978); *State v. Stroud*, 200 Neb. 27, 261 N.W.2d 777 (1978); *State v. Davis*, 200 Neb. 557, 264 N.W.2d 198 (1978); *State v. Jackson*, 200 Neb. 827, 265 N.W.2d 850 (1978). The above cases are but just a sample of the many to be found declaring the cited rule.

Having heretofore declared, without apparent exception, that absent an abuse of discretion we will not reduce a sentence imposed within statutory limits, I am unable to conclude the basis upon which we do so in this case. Apparently there was some argument by appellant that he was not in possession of the marijuana with intent to distribute and therefore not guilty of the

crime. That matter, however, was resolved by the jury against appellant, and therefore, on appeal, we must assume that the jury found, beyond a reasonable doubt, that appellant was guilty of possession of marijuana with intent to distribute. I do not believe our action in this case does anything to aid either the trial courts or the prosecutors in handling such matters, but, to the contrary, only creates confusion and invites unmeritorious appeals to the court which will not prove to be successful. I would have affirmed the judgment in all respects.

I am authorized to announce that WHITE and HASTINGS, JJ., join in this concurrence and dissent.

CENTER BANK, A STATE BANKING CORPORATION, ET AL., PLAINTIFFS, V. DEPARTMENT OF BANKING AND FINANCE OF THE STATE OF NEBRASKA ET AL., DEFENDANTS.

313 N.W.2d 661

Filed December 18, 1981. No. 44421.

1. **Legislative Enactments: Constitutional Law.** A legislative bill on final reading requires the affirmative vote of a majority of all the members elected to the Legislature before it can become law.
2. ____: ____. The Lieutenant Governor is not eligible to vote on legislative bills on final reading.
3. ____: ____. The Constitution limits the action the Governor may take in regard to a legislative bill when it is presented to him for his consideration.
4. ____: ____. If the Governor returns a legislative bill to the Legislature within 5 days after it has been presented to him, with a statement of his objections to the bill, the bill cannot become law unless it is reconsidered by the Legislature, as provided in the Constitution.

Original Action.

Judgment for the defendants.

Barlow, Johnson, DeMars & Flodman and Ryan & Williams, P.C., for plaintiffs.

Paul L. Douglas, Attorney General, and John Boehm

for defendants.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and HASTINGS, JJ., and RONIN, Retired District Judge.

BOSLAUGH, J.

This is an original action brought to determine whether L.B. 376 was duly enacted by the First Session of the Eighty-seventh Legislature. The bill in question relates to banking and, among other provisions, authorizes banks to establish and maintain additional "detached auxiliary offices" at which banking transactions may be made.

The plaintiffs made application to the Department to establish detached auxiliary offices as authorized by L.B. 376. Upon the advice of the Attorney General that L.B. 376 was not effective, the Department refused to act upon the applications. The plaintiffs then commenced this action against the Department and its director to determine whether L.B. 376 was effective.

The essential facts are admitted by the pleadings. The case presents only questions of law.

On May 28, 1981, L.B. 376 was on final reading in the Legislature. All 49 senators and the Lieutenant Governor were present. On the question, "Shall the bill pass?" 24 senators voted in the affirmative, 24 senators voted in the negative, and one senator abstained. The Lieutenant Governor, as president of the Legislature, then declared the Legislature equally divided, voted in the affirmative, and declared the bill passed. The first issue to be determined is whether the Lieutenant Governor, as president of the Legislature, was entitled to vote on the bill on final reading.

There are two constitutional provisions which must be considered. Article III, § 13, of the Nebraska Constitution provides in part: "No bill shall be passed by the Legislature unless by the assent of a majority of all members elected . . . ." Article III, § 10, of the Nebraska Constitution provides in part: "The Lieutenant

Governor shall preside, but shall vote only when the Legislature is equally divided." The plaintiffs contend that the Lieutenant Governor was entitled to vote on final reading and that L.B. 376 was duly passed. The defendants contend that L.B. 376 failed to receive "the assent of a majority of all members elected" and, thus, failed to pass.

The parties have cited decisions in other states which have arrived at different conclusions under similar constitutional provisions. We consider none of these authorities to be controlling.

The language of article III, § 13, is so clear that we believe there can be little doubt about its meaning. That provision requires "the assent of a majority of all members elected" to the Legislature. The Lieutenant Governor is not a member of the Legislature. Since the Legislature consists of 49 members, a bill must receive the affirmative vote of 25 senators on final reading before it can become law. Because L.B. 376 received the affirmative vote of only 24 senators on final reading, it failed of passage and did not become law.

This interpretation does not destroy the meaning of article III, § 10, but harmonizes the two provisions and gives effect to both. The Lieutenant Governor is eligible to vote on all other questions before the Legislature, when it is equally divided.

This interpretation also finds support in some of the earlier decisions of this court on somewhat related questions.

In *State v. Gray*, 23 Neb. 365, 36 N.W. 577 (1888), two members of a four-member city council voted "aye," two members abstained, the mayor voted "aye" and declared the motion passed. The statute required "a concurrence of a majority of the whole number of members elected to the council," and further provided, "The mayor . . . shall have a casting vote when the council is equally divided, and none other . . . ." This court stated at 369, 36 N.W. at 578-79: "Considering these sections together, there can be no doubt that to

pass an ordinance for the reorganization of the city by increasing the number of wards, and of the membership of the council, it required the concurring vote of a majority of all the councilmen elected, and the vote of two members of a council consisting of four members was not sufficient, and that the vote of the mayor added nothing to the significance of the proceeding."

In *Rohrer v. Hastings Brewing Co.*, 83 Neb. 111, 119 N.W. 27 (1908), the applicable statutes gave the mayor "a casting vote when the council is equally divided," and further required "a concurrence of a majority of the whole number of the members elected to the council" to pass an ordinance. We held at 114, 119 N.W. at 28: "As to every other act of the council, except the passage of ordinances, the mayor may vote in case of a tie vote of the councilmen."

The parties have briefed and argued another question which should be decided because of its importance in regard to the legislative process.

After L.B. 376 had been declared passed, the Lieutenant Governor signed the bill while the Legislature was still in session. L.B. 376 was then presented to Governor Thone. On May 29, 1981, an aide to the Governor brought the engrossed copy of L.B. 376 to the Clerk of the Legislature, together with a letter from the Governor. In the letter the Governor stated that he was not vetoing the bill, but simply returning it based upon an Attorney General's opinion that the bill had not been passed by the Legislature since only 24 senators had voted in the affirmative the previous day. The Clerk attempted to refuse delivery of the engrossed copy of the bill, but it was left on the receptionist's desk outside the Clerk's office.

When the Governor's letter was read to the Legislature on May 29, 1981, one senator moved that the Legislature reconsider the bill. Another senator raised a point of order to the effect that the motion to override was out of order since the bill had not been vetoed. The Chair declared the motion to override out of order, and a

motion to overrule the Chair was defeated. The bill was not again reconsidered by the Legislature.

The letter which the Governor sent to the Legislature on May 29, 1981, stated in pertinent part: "I have on my desk LB 376. On the advice of the Attorney General, with which I most certainly agree, it appears that LB 376 has not been passed by the Legislature.

. . . .

"The Legislature's Journal clearly indicates that LB 376 received only 24 votes from elected members of the Legislature. Twenty-five votes are needed for a Constitutional majority. Therefore, this bill did not meet the Constitutional requirement and was not passed by the Legislature.

"The return of LB 376 to the Clerk of the Legislature is a clerical function and is not, and should not be construed as, an exercise of the Governor's authority under Article IV, Sec. 15 of the Constitution of the State of Nebraska. In other words, I am not by this action exercising my Constitutional authority to veto this purported piece of legislation which was never legally passed by the Legislature."

The Constitution limits the action the Governor may take when the Legislature presents a bill to him for his consideration. "Every bill passed by the Legislature, before it becomes a law, shall be presented to the Governor. If he approves he shall sign it, and thereupon it shall become a law, but if he does not approve . . . he shall return it with his objections to the Legislature . . . . Any bill which shall not be returned by the Governor within five days (Sundays excepted) after it shall have been presented to him, shall become a law in like manner as if he had signed it; unless the Legislature by their adjournment prevent its return; in which case it shall be filed, with his objections, in the office of the Secretary of State within five days after such adjournment, or become a law." Neb. Const. art. IV, § 15.

In the present case the Governor did not sign the

bill. He returned the bill within 5 days with a message stating his objections.

The Nebraska Constitution does not give the Governor the power to return a bill to the Legislature as a "clerical function." The Constitution clearly provides that if the Governor returns the bill to the Legislature with his objections, the bill shall be reconsidered and become a law if it is repassed by a vote of three-fifths of the members elected.

The Governor's letter stated his objections to the bill. The fact that the objections did not go to substantive provisions of the bill was of no consequence. See *Birdsall v. Carrick*, 3 Nev. 154 (1867).

In this case, the return of L.B. 376 to the Legislature by the Governor with his objections would have prevented the bill from becoming law unless it was reconsidered by the Legislature and passed as provided in the Constitution.

It is unnecessary to consider any of the other questions raised by the parties.

For the reasons stated in this opinion, the judgment is in favor of the defendants.

JUDGMENT FOR THE DEFENDANTS.

KRIVOSHA, C.J., concurring in the result, and in part dissenting.

I find that while I concur with the result reached by the majority of the court in this case, I must in part dissent.

In particular, I agree with the majority of the court when it concludes that when the Governor returned to the Legislature L.B. 376, together with his letter setting out the reason why he would not sign the bill into law, the Legislature was required to reconsider the bill if it was to become law. For that reason, I agree with the majority's opinion that judgment must be in favor of the defendants in this case.

I do not, however, agree with the conclusion reached by the majority of the court to the effect that the

Lieutenant Governor is not eligible to vote for legislative bills on final reading. In my view this conclusion totally ignores the plain meaning of Neb. Const. art. III, § 10. I believe that the majority has reached the wrong conclusion because it has misinterpreted the meaning of Neb. Const. art. III, § 13, which provides in part: "No bill shall be passed by the Legislature unless by the assent of *a majority of all members elected* . . . ." (Emphasis supplied.) The majority concludes that only members of the Legislature may cast a vote in connection with a legislative bill on final reading. I believe that such a narrow reading of the Constitution is unnecessary.

In my opinion, the provisions of article III, § 13, are intended only to aid in determining how the necessary majority is to be computed. Under the provisions of Neb. Const. art. III, § 6, the Legislature shall consist of not more than 50 members and not less than 30 members. The exact number may vary from time to time. Furthermore, article III, § 10, provides in part: "A majority of the members elected to the Legislature shall constitute a quorum . . . ." Article III, § 13, is simply intended to prescribe the formula to be used in computing the number of votes required to effect passage of a legislative bill on final reading. Article III, § 13, provides, in effect, that when the Legislature consists of 49 members, 25 votes are required in order for a bill to pass on final reading. The language of article III, § 13, was necessary, otherwise one might argue that the majority necessary to pass a bill on final reading meant "the majority of those present and voting," in this case 13 votes, as opposed to a majority of those constituting the legislative branch of government, whether present or not.

This is, to some extent, made clear by our decision in *In re Contest Proceedings*, 31 Neb. 262, 273, 47 N.W. 923, 926 (1891), where we said in part: "It was in obedience to this change of sentiment that our constitution finally provided that all bills and joint resolu-

tions should be read on three separate days in each house respectively, and also provided that all bills should pass by a majority—not of a quorum—which had once been the universal rule, but by a majority of all the members elected to each house, and that the votes should be taken by ayes and noes, and entered upon the journal."

It occurs to me that any other interpretation has the effect of repealing article III, § 10, which provides: "The Lieutenant Governor shall preside but *shall* vote only when the Legislature is equally divided." (Emphasis supplied.)

The framers of the Constitution had already provided that a majority of the members elected constituted a quorum, and therefore they wished to make it clear that it required more than just a simple majority present and voting to pass a bill.

It is suggested by the majority opinion that the provisions of article III, § 10, are not repealed because the Lieutenant Governor may vote on anything other than a bill on final reading. However, the reading of article III, § 13, makes no provision for anything other than final reading. The fact that the Legislature has determined by rule to have more than one reading of a bill is a matter of internal procedural rules and not a matter of constitutional requirement. Should the Legislature determine in the future to eliminate all of those procedures and simply follow the mandates of Neb. Const. art. III, § 14, no constitutional violation would occur, and yet, under that basis, the Lieutenant Governor would have no vote in any instance. It is difficult to conceive why the Constitution would authorize preliminary matters to be passed by a simple majority of the Legislature and authorize the Lieutenant Governor to vote to break a tie in such cases and at the same time require a majority of members elected to the Legislature to pass a bill on final reading and take away the Lieutenant Governor's authority to break such a tie without specifically

saying so. I cannot believe that is what the framers of the Constitution intended.

A number of states which have been presented with similar questions have resolved the issue in the same manner as suggested by this dissent. See, *State ex rel. Easbey v. Highway Patrol Bd.*, 140 Mont. 383, 372 P.2d 930 (1962); *Opinion of the Justices*, 225 A.2d 481 (Del. 1966); *Advisory Opinion on 1978 PA 426*, 403 Mich. 631, 272 N.W.2d 495 (1978).

In *State ex rel. Easbey*, a bill presented to the Montana Senate resulted in a final reading vote of 27 senators in favor and 27 senators opposed, with two senators excused. The Lieutenant Governor, who was then presiding over the Senate, broke the tie by voting in favor of the bill. The applicabie provisions of the Montana Constitution were identical with the Nebraska Constitution. Finding that the Lieutenant Governor did have authority to vote, the Montana Supreme Court said at 391, 372 P.2d at 935: "The people of Montana have specifically supplied the answer to the above question in their Constitution wherein they have 'expressly directed or permitted' and conferred various special powers on the Lieutenant Governor, not the least of which, is the power, right and high privilege of presiding over the sessions and meetings of the State Senate as its President with the express direction that, while so presiding, he 'shall vote only when the senate is equally divided.'" (Emphasis omitted.)

The Montana court went on further to say at 399, 372 P.2d at 939: "The power which the people of Montana expressly conferred upon their Lieutenant Governor, to give the casting vote 'when the senate is equally divided,' [citation omitted] vests in the Lieutenant Governor alone. At no time does such power vest in any State Senator. Since the Lieutenant Governor is not empowered to vote unless and until 'the senate is equally divided,' it necessarily follows that, with this single, specific and express exception,

the right to vote in the Senate is restricted to the duly elected and qualified State Senators, there present and voting. However, 'when the senate is equally divided' by reason of a tie vote, it is then and there that the Lieutenant Governor, is expressly empowered, permitted and directed to step in, take over and cast the deciding vote either for or against the bill, resolution, question or proposition being voted upon. This 'casting vote' of the Lieutenant Governor, so expressly provided for, when cast, is to be counted and when counted it becomes and is the efficient parliamentary device that decides and determines the fate of the bill or proposition being voted upon. Such 'casting vote' tips the scales and breaks the deadlock and tie of an 'equally divided' Senate. It produces 'a vote of a majority of all the members' present in the Senate and voting upon the proposition submitted. It specifically meets and fully satisfies the general provisions and requirements of section 24 of Article V of Montana's Constitution." (Emphasis omitted.)

And in *Opinion of the Justices*, *supra*, the Delaware court, in deciding an identical question as that presented here, said at 484-85: "The applicable rules of construction require that effect be given, if possible, to the whole Constitution and to every word thereof. If different portions of the Constitution seem to conflict, they must be harmonized if possible. That construction must be favored which will render every word of the instrument operative; and that construction must be avoided which would make any provision idle and nugatory. Every provision of the Constitution must be construed, whenever possible, to give effect to every other provision. Otherwise stated, whenever avoidable, no constitutional provision should be so construed as to nullify, or substantially impair, any other constitutional provision or to produce an irrational result. . . .

. . . .

"It is unreasonable to assume, we think, that the

framers of the Constitution intended to limit the casting vote, vested in the Lieutenant Governor by Art. 3, § 19, to those less important functions and decisions which were left by the Constitution to a majority of a quorum of the Senate. It is more reasonable to assume, in our opinion, that the casting vote of Lieutenant Governor was intended to break ties in the more important matters before the Senate, as well as the less important ones. It is in the public interest that there be a proper method to break deadlocks and to avoid impasse in the Senate. This was the rationale for vesting in the Vice President the casting vote in the United States Senate: 'to secure at all times the possibility of a definitive resolution of the body.' The Federalist Papers, No. 68: Hamilton. The more important the matter pending for decision, the more essential such tie-breaking device is to the public welfare."

The Michigan Supreme Court reached a similar conclusion in analyzing a somewhat identical constitutional provision in the case of *Advisory Opinion on 1978 PA 426, supra.*

I believe that by taking the position which we have taken today, we have effectively eliminated the office of Lieutenant Governor as the president of the Legislature and have, in effect, repealed article III, § 10. I see no reason for us to do so, and I would have held that the Lieutenant Governor does indeed have the right to cast a tie-breaking vote on final reading.

CLINTON and BRODKEY, JJ., join in this concurrence and dissent.

JACK CLINE ET AL., APPELLANTS, V. FRANKLIN PORK, INC., APPELLEE.

313 N.W.2d 667

Filed December 28, 1981. No. 43460.

1. **Equity: Appeal and Error.** Even though this is an equity action and upon appeal is triable de novo, it is still subject to the condition that when the evidence on material questions of fact is in irreconcilable conflict, the court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite.
2. **Nuisances.** Ordinarily, a legitimate business enterprise is not a nuisance per se, but it may become a nuisance in fact. It may become such by reason of the conditions implicit in and unavoidably resulting from its operation or because of the manner of operation.
3. _____. The exercise of due care by the owner of a business in its operation is not a defense to an action to enjoin its operation as a nuisance.
4. **Injunction: Nuisances.** A court of equity will not usually enjoin the operation of a lawful business without regard to how serious may be the grievance caused thereby. In the first instance, at least, it will require the cause of the grievance to be corrected and will enjoin the conduct perpetually after it is proven that no application of endeavor, science, or skill can effect a remedy where the owners cannot be induced to conduct it properly.
5. **Trial: Judges.** Neb. Rev. Stat. § 27-605 (Reissue 1979) states that the judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

Appeal from the District Court for Franklin County: FRED R. IRONS, Judge. Reversed and remanded with directions.

Thomas P. McNally of McKelvie & McNally and William H. Stowell for appellants.

Crosby, Guenzel, Davis, Kessner & Kuester for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

WHITE, J.

This is an action by the plaintiffs, Jack Cline and Ruth Cline, to enjoin the defendant, Franklin Pork, Inc.,

from the operation of a pig-feeding operation. The plaintiffs alleged that the operation constitutes a nuisance and interferes with the plaintiffs' use and enjoyment of their home and farm.

Plaintiffs are the owners and occupants of a farm in Franklin County, Nebraska. The farm was purchased on March 14, 1974, and plaintiffs have lived there since July 1974. Their farmland is used primarily for the raising of crops; however, a few horses and cattle are kept on the premises.

The defendant, Franklin Pork, Inc., was incorporated on July 11, 1974, and purchased the farmland north of the Clines' farm on August 15, 1974. After receiving complaints and opposition to construction of a hog facility from adjoining neighbors, including the Clines, the defendant constructed a hog facility with a capacity of 800 sows and 6,000 to 7,000 head of hogs. The facilities include five feeding floors, five nurseries, five sets of isolettes, and five sow-raising floors, in addition to three holding ponds maintained to catch runoff water and manure from the feedlots.

At the conclusion of the trial, the trial court found that a nuisance existed. The trial court in its order of April 3, 1979, stated: "2. No final order as to a remedy for plaintiffs or the issuance of an injunction to enjoin the defendant from the continued operation of its hog-raising facility at its present location should be entered at this time but should be reserved for final determination at a date subsequent hereto so as to afford the Court the opportunity to monitor the continuing operation of the defendant's facility and determine whether or not the defendant can abate the nuisance to the plaintiffs' property." The trial court appointed a monitoring team consisting of District Judge Fred Irons, the presiding judge, District Judge Bernard Sprague, and a representative of the Nebraska Department of Environmental Control. The order provided that the monitoring team was to make periodic inspections and reports to the court. The court would provide summaries of the

reports to the attorneys for the parties. Neither of the parties objected to the appointment of the monitoring team at the time of the order. From April 14, 1979, through November 1, 1979, the monitoring team made several inspections of the area surrounding Franklin Pork, Inc., and the Cline residence. Reports were made to the trial court and were subsequently summarized and sent to the parties. On November 26 and 27, 1979, and January 7, 1980, a further hearing was held to determine whether the defendant had taken appropriate action and made substantial progress in reducing the level of flies and odor to an acceptable level. At the conclusion of the hearing, the trial court found that the nuisance previously found to exist had been corrected and that the defendant's operation did not materially interfere with the plaintiffs' use and enjoyment of their premises, and dismissed plaintiffs' petition. The plaintiffs appeal from that decision.

Since this is an equity action, it is the duty of this court to try the issues de novo and to reach an independent conclusion without reference to the findings of the District Court. *Daugherty v. Ashton Feed and Grain Co., Inc.*, 208 Neb. 159, 303 N.W.2d 64 (1981); *Prauner v. Battle Creek Coop. Creamery*, 173 Neb. 412, 113 N.W.2d 518 (1962). We are reminded that even though this is an equity action and upon appeal it is triable de novo, it is still subject to the condition that when the evidence on material questions of fact is in irreconcilable conflict, the court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite. *Tilden v. Beckmann*, 203 Neb. 293, 278 N.W.2d 581 (1979); *Rolfsmeyer v. Seward County*, 182 Neb. 348, 154 N.W.2d 752 (1967).

The plaintiffs, in their first assignment of error, allege that the trial court erred in failing to immediately enjoin the operation of the pork facility at the end of the first trial. Ordinarily, a legitimate business

enterprise is not a nuisance per se, but it may become a nuisance in fact. It may become such by reason of the conditions implicit in and unavoidably resulting from its operation or because of the manner of its operation. *Botsch v. Leigh Land Co.*, 195 Neb. 509, 239 N.W.2d 481 (1976); *City of Syracuse v. Farmers Elevator, Inc.*, 182 Neb. 783, 157 N.W.2d 394 (1968).

The exercise of due care by the owner of a business in its operation is not a defense to an action to enjoin its operation as a nuisance. See *Botsch, supra.*

At the conclusion of the trial, the judge found that the existence of the conditions clearly established that the defendant's hog operations constituted a nuisance. The plaintiffs contend that at that point the trial judge should have enjoined the defendant's operations. We disagree with the plaintiffs' contentions.

This court has said: "The corruption of the atmosphere by the exercise of any trade or by any use of property that impregnates it with noisome stenches has ever been regarded as among the worse class of nuisances. The right to have the air floating over one's premises free from noxious and unnatural impurities is a right as absolute as the right to the soil itself . . . ." *Francisco v. Furry*, 82 Neb. 754, 755-56, 118 N.W. 1102, 1102-03 (1908).

We quoted *Baldwin v. McClendon*, 292 Ala. 43, 288 So. 2d 761 (1974), in *Botsch, supra.* In *Baldwin*, a large hog-raising operation, with lagoons, located in a strictly farm area was held to be a nuisance. The waste material in the lagoons generated offensive odors. The court in *Baldwin* held: "Fact that hog-raising operation was carried on in a rural community given over almost entirely to agricultural pursuits was a factor to be considered in determining whether odors emanating from the property constituted a nuisance, but there were other factors, including proximity of the operation to neighbors' home, intensity and volume of odors, their interference, if any, with neighbors own well-being and enjoyment of their home and any consequential de-

preciation in the value of the home." (Syllabus of the court.) The court further stated at 53, 288 So. 2d at 769: "Moreover, assuming that the appellants' operation met some set of sanitary standards for similar operations, this would not affect the appellee's right to equitable relief, because the issue is not whether the appellants were negligent . . . or their business lawful, but whether or not from the inherent qualities of the business, or the manner in which it is conducted, it directly causes substantial injury to the properties of the appellees, or produces material annoyance and inconvenience to them in the comfortable enjoyment of their home." The continuation of the hearing to determine if the nuisance could be abated was well within the discretion of the trial court in view of the enormous economic consequences attendant to a complete shutdown of the operation. We agree with that decision of the trial court. The assignment is without merit.

The facts show that the plaintiffs' home is located between 1,030 feet and 1,430 feet from the nearest holding pond on the defendant's land. The plaintiffs' land is located south and downhill from the defendant's land. A draw runs on the west side of the plaintiffs' home. Terry Johnson of the Department of Environmental Control testified that the odor and flies at Franklin Pork were no more offensive or extensive than could be expected for that size of operation. However, as *Baldwin* pointed out, standards from similar operations do not affect plaintiffs' right to equitable relief. The fact that the residence is in a rural area requires an expectation that it will be subjected to normal rural conditions but not to such excessive abuse as to destroy the ability to live in and enjoy the home, or reduce the value of the neighboring property. A rural home and a rural family, within reason, are entitled to the same relative protection as others. See *Botsch v. Leigh Land Co.*, 195 Neb. 509, 239 N.W.2d 481 (1976).

A court of equity will not usually enjoin the operation of a lawful business without regard to how serious may

be the grievance caused thereby. In the first instance, at least, it will require the cause of the grievance to be corrected and will enjoin the conduct of the enterprise perpetually after it has been proven that no application of endeavor, science, or skill can effect a remedy where the owners cannot be induced to conduct it properly. *Prauner v. Battle Creek Coop. Creamery*, 173 Neb. 412, 113 N.W.2d 518 (1962); *Botsch, supra.* The trial judge erred in not enjoining the defendant from creating a nuisance at the end of the trial. This is not the same as enjoining the defendant's operations. The plaintiffs, however, were not prejudiced thereby since the trial court required the grievance to be corrected as it would have if it had enjoined the conduct of Franklin Pork.

The plaintiffs contend that the trial court should not have suggested efforts to be pursued by Franklin Pork to abate the nuisance and avoid injunction. As we said before, a court of equity will not usually enjoin an operation permanently without first requiring that the nuisance be abated if at all possible. It stands to reason that the trial judge should inform the defendant as to what portions of its operation constitute a nuisance and to suggest efforts to correct the problem. There was no error in doing so.

The plaintiffs allege that the trial court's impartiality in its adjudicatory function was destroyed by its participatory role as a monitor and its appointment of the other district judge in the same judicial district as a monitor after he had previously disqualified himself.

Neb. Rev. Stat. § 27-605 (Reissue 1979) states: "The judge presiding at the trial may not testify in that trial as a witness. *No objection* need be made in order to preserve the point." (Emphasis supplied.) The plaintiffs and the defendant in this case had no obligation to object to the judge appointing himself as a monitor or to his reports as a monitor when they were received into evidence. Rule 605 in the Federal Rules of Evidence automatically disqualifies the presiding judge, giving him no discretion in the matter. It is suggested that not

only is the judge completely divested of any discretion but it would be improper for the parties to agree among themselves and with the judge that he should continue to preside while being a witness. McCormick on Evidence § 68 nn. 76-77 (2d ed. 1972); Fenner, *Competency and Examination of Witnesses Under Article VI of the Federal Rules of Evidence and the Nebraska Rules of Evidence*, 9 Creighton L. Rev. 559 (1975-76). McCormick also suggests that if no one complains of such a course of action, if the issue is not raised on appeal, then such an agreement would have the practical effect of repealing the rule.

The record indicates that counsel were under the impression that they had to object to the trial judge appointing himself as a monitor. In light of this, they waived all objections under Rule 605 and allowed the monitoring reports to be received into evidence.

The purpose of Rule 605 was to avoid embarrassing the court, the hindrance of justice, scandals in the courts, and to avoid any appearance of impropriety or partiality. The reason that no objection is required is to eliminate the possibility of any hostility arising between the trial judge and counsel. While the other members of the monitoring team were subjected to cross-examination, the trial judge was not. From a practical point of view, it would be nearly impossible for the presiding judge to be cross-examined. The functions of a judge and a witness are incompatible and it is utterly impossible for one to exercise the rights of a witness and to perform the duties of a judge at one and the same time. See *Re Hildreth Estate*, 113 Vt. 26, 28 A.2d 633 (1942).

Nebraska Evidence Rule 605 was adopted and is identical to Federal Rule of Evidence 605. However, 28 U.S.C. § 455 (1977) provides that the presiding judge must disqualify himself if he has been or is likely to be a "material witness" or if he has "personal knowledge of disputed evidentiary facts concerning the proceeding." Further, it provides generally that he "shall disqualify

himself in any proceeding in which his impartiality might reasonably be questioned." Nebraska does not have a similar statute. The latter disqualification is subject to waiver by the parties, upon full disclosure, while the first two mentioned disqualifications cannot be waived. Here the judge was a material witness in the subsequent hearing, monitored the abatement process, and accepted his reports into evidence. There is no indication from the record or from the judge's memorandum or judgment indicating the weight he placed upon his own reports. It can only be expected that one's own observations will form the larger impression and will carry greater weight than other evidence in reaching a decision. The presiding judge made six inspections between April 3, 1979, and November 26, 1979. All of his inspections were between the hours of 9 a.m. and 5 p.m., with most of the inspections occurring around noon. In each of his inspections, the presiding judge stated that there was a strong penetrating odor on the Franklin Pork site but that it decreased to a moderate odor a short distance away. The presiding judge found that the fly population appeared moderate to normal for a farmstead and that the odors were tolerable and seemed normal for a farmstead. There was evidence introduced indicating that the odors were the worst in the evenings and nighttime. Only one of the monitors, Judge Sprague, made any evening inspections. Judge Sprague made only one evening inspection at about 9:30 p.m., and found that the odors were tolerable and normal for the area.

The plaintiffs introduced testimony from Dr. Robert H. Shaw, a climatologist, which indicated that the odor was present 79 percent of the nights. Dr. Shaw's testimony related primarily to air drainage around Franklin Pork and the Cline residence. His testimony was based on data collected from the Cline weather station at their home and the normal wind patterns for that particular area of Nebraska. Dr. Shaw's testimony indicated that on 79 percent of the nights there was a

temperature inversion causing an air drainage from the Franklin Pork property down the draw west of the Cline residence. Shaw indicated that these air drainages could carry the odors from the pork facility.

There was conflicting testimony offered by the defendant's expert witness, George F. Collins. Collins' testimony essentially challenged the accuracy of the findings by Dr. Shaw based on the data collected by the Clines from their thermometers and wind gauges. Collins' testimony did not rule out the possibility that an air drainage had occurred. His testimony only went to the fact that Dr. Shaw's findings were not made with as accurate instruments and data as should have been used. On cross-examination Collins indicated that proper experiments under the circumstances would cost between $60,000 and $80,000.

In light of this testimony, we are unable to rule out the possibility that the presiding judge placed greater weight on his own reports than on any other testimony. There appears to be sufficient evidence in the record upon which one could find that the nuisance had not, in fact, been abated.

Can the parties waive the disqualification of the judge under § 27-605? We are persuaded that for the sake of the orderly administration of justice and meaningful review, they cannot.

If this was a law action, we clearly would have to reverse since, under our standard of review, we must affirm findings of fact made by the court or jury unless clearly wrong. *Gehrke v. General Theatre Corp.*, 207 Neb. 301, 298 N.W.2d 773 (1980). We would not have before us all the facts on which the trier of facts based his decision. We could not determine if the fact finder was wrong unless we were to ignore completely that the impressions of the trial judge, unrevealed to us, may have constituted the primary reason for the decision. However, this is an equity case. We are required to make an independent judgment on the facts. The same difficulty still presents itself; all evidence is not

before us. We have only the brief summaries of the trial judge which were received in evidence without cross-examination. The trial judge's appointment of himself as monitor was error, and the error so permeates this trial as to make it advisable to reverse this matter and return it to the trial court with directions to hold a new hearing to determine if the nuisance has, in fact, been abated.

REVERSED AND REMANDED WITH DIRECTIONS.

BEAVER LAKE ASSOCIATION, APPELLANT, V. COUNTY BOARD OF EQUALIZATION OF CASS COUNTY, AND CASS COUNTY, APPELLEES.

313 N.W.2d 673

Filed December 28, 1981. No. 43509.

1. **Taxation: Valuation: Appeal and Error.** The trial of an appeal from a county board of equalization involving the valuation of real estate both in the District Court and the Supreme Court is de novo as an equitable proceeding.
2. **Taxation: Words and Phrases.** For the purposes of taxation, the terms actual value, market value, and fair market value mean exactly the same thing.
3. **Taxation: Valuation: Presumptions.** There is a presumption that a board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action, which presumption remains until there is competent evidence to the contrary.
4. ____: ____: ____. Such presumption disappears when there is competent evidence on appeal to the contrary, and from that point on the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon evidence, with the burden of showing such valuation to be unreasonable resting upon the appellant on appeal from the action of the board.
5. **Taxation: Valuation: Proof.** The burden which the appellant must carry in order to be successful on appeal is to demonstrate by the evidence that the assessment is grossly excessive and is a result of arbitrary or unlawful action, and not a mere error of judgment. It is only where such assessed valuations are not in accordance with law, or it is made to appear that they were made arbitrarily or capriciously, that courts will interfere.

Appeal from the District Court for Cass County: RAYMOND J. CASE, Judge. Affirmed.

Herbert J. Elworth of Casey & Elworth for appellant.

Ronald D. Moravec, Cass County Attorney, for appellees.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

HASTINGS, J.

Beaver Lake Association, a Nebraska corporation (Association), filed a protest with the Board of Equalization of Cass County (Board), complaining of an erroneous assessment for the years 1978 and 1979 of certain "common areas" owned by the Association. These areas are located within Beaver Lake Development, sometimes referred to as Beaver Lake Subdivision, in Cass County. The protest was denied on appeal to the District Court for Cass County which found that the Association had failed to sustain its burden of showing that the values as finally determined by the Board were arbitrary, unlawful, discriminatory, unjust, or unfair, and affirmed the action of the Board. The Association has appealed to this court, assigning that action of the District Court as error. We affirm.

In deciding this case, we must be governed by several well-established legal principles. The trial of an appeal from a county board of equalization involving the valuation of real estate both in the District Court and the Supreme Court is de novo as an equitable proceeding. *Gradoville v. Board of Equalization*, 207 Neb. 615, 301 N.W.2d 62 (1981). For purposes of taxation, the terms actual value, market value, and fair market value mean exactly the same thing. *Gradoville, supra.* There is a presumption that a board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action, which presumption remains until there is competent

evidence to the contrary. Such presumption disappears when there is competent evidence on appeal to the contrary, and from that point on the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon evidence, with the burden of showing such valuation to be unreasonable resting upon the appellant on appeal from the action of the board. *Gradoville, supra.* The burden which the appellant must carry in order to be successful on appeal is to demonstrate by the evidence "'that the assessment is grossly excessive and is a result of arbitrary or unlawful action, and not a mere error of judgment. . . . It is only where such assessed valuations are not in accordance with law, or it is made to appear that they were made arbitrarily or capriciously, that courts will interfere.'" *Id.* at 618, 301 N.W.2d at 64.

It is the Association's contention that the common areas are dedicated to the exclusive use and enjoyment of the lot owner members, which burden of use deprives those areas of any market value, and that any value which once existed in those areas has been absorbed by and included within each individual lot. Therefore, the Association reasons, the actual value of these common areas, within the meaning of Neb. Rev. Stat. § 77-201 (Reissue 1976) and as defined by Neb. Rev. Stat. § 77-112 (Reissue 1976), is at best nominal. It has suggested valuations of approximately 10 percent of those figures set by the Board.

According to the briefs of the parties, Beaver Lake Development is a subdivision of approximately 600 acres in rural Cass County, containing some 2,000 residential lots and certain common areas consisting of a 325-acre lake basin and dam, certain roads, water and sewage treatment plants and distribution and collection systems, a clubhouse, and recreational use sites. The Association is a not-for-profit corporation organized by the original developer of Beaver Lake Subdivision in 1970. Its purpose generally, as expressed in the articles of incorporation, is to "acquire . . .

operate . . . and maintain utility and recreational facilities . . . and otherwise to provide for the . . . interests of its members . . . ." Membership in the Association consists generally of residential lot owners and members of their families.

According to the testimony of Dennis Madigan, the president of the Association, dues are collected from each member to enable the Association financially to accomplish its functions. These functions include the maintenance and policing of interior roads and the lake and recreation areas, as well as all property owned by the Association. All of this property, the so-called "common areas," was purchased by the Association from the U.S. National Bank in April of 1977 for the sum of $662,500. It was also his testimony that the common areas belong to all of the lot owners jointly with no authority on the part of the Association to sell any of such areas. This was expressed as an opinion based on the stated purposes for organization contained in the articles of incorporation, a portion of which is quoted above. However, on cross-examination, he stated he guessed that the title to these properties was in the Association, but that it was his understanding that these common areas were for the exclusive and sole use of the lot owners.

The only evidence of the restriction on the use of the common areas, other than the testimony of the witnesses, must be found in the articles of incorporation and the bylaws of Beaver Lake Association, a standard form of membership agreement, and a lot purchase agreement utilized in the sale of building lots from the Association to the member owners.

We have previously referred to the purpose of the corporation set forth in the articles of incorporation, which is to acquire and maintain recreation facilities for the interests of the members. The only section of the bylaws cited by the Association as relating to the use of facilities is section 9. This provides in part that "all . . . Members . . . shall be entitled as appropriate to

enjoy or otherwise to use and benefit from all common facilities . . . operated or provided by the corporation." Each member is required to pay dues as from time to time may be determined by the board of directors.

By the terms of the membership agreement, the lot owner members are required to pay annual dues for maintenance and operation of the common facilities. Members also are to recognize that the rules and regulations pertaining to the Association may be amended from time to time by the directors as provided in the bylaws. The agreement further provides that the members understand that the Association is the owner of the roads, water and sewer facilities, lake, and other Association facilities.

Finally, the lot purchase agreement provides: "Use of the lake shall be subject to the rules and regulations of Beaver Lake Association. Seller [Association] reserves the use of the lake and other facilities for its corporate purposes without limitation." The Association also retains authority to amend or revoke the restrictions and conditions in whole or in part.

Counsel for the Association, in his questioning of William Otis, a witness as to values, suggests that the common areas are burdened with the perpetual use by the lot owners. We might agree that undoubtedly it was the understanding of the lot owners, and it may very well have been the intention of the developers and sellers of the lots, that such was the case. Nevertheless, no grant of such an easement to or title in such common areas appears of record as having accompanied the conveyance of each lot.

The evidence as to valuations of the common areas is contained in the testimony of Boyd Roberts, who does the evaluation work for Cass County; Carl Howe, a real estate broker who sells lots in Beaver Lake Subdivision; William Otis, a real estate appraiser from Omaha; and Gerald Ault, the Cass County assessor.

Mr. Roberts, when questioned by counsel for the Association, simply stated that in his opinion the

figures of $161,970 as the assessed valuation of the "common properties" for the year 1978, and $404,595 for 1979, were very conservative. Considering that these figures represent 35 percent of actual value, these compare favorably with the full valuations of $554,525.40 and $1,157,141.70, respectively, placed on these properties by the county assessor, which were affirmed by the Board and the District Court.

Mr. Howe stated that the lot owners did not acquire any title interest in the common properties, but that each was entitled to the exclusive use of the lake as an owner. Although expressing no opinion as to value of the common areas, he left the suggestion that such areas have no value because the "total value of the lake is assessed on the total of the lots."

The expert appraiser, Mr. Otis, proceeded on the assumption that the lake and common areas were reserved to the exclusive use of the members of the Association. He recited the seven statutory criteria for determining values, i.e., earning capacity, relative location, desirability and functional use, reproduction cost less depreciation, comparison with other properties, market value in the ordinary course of trade, and existing zoning of the property. It was his opinion that, based upon those factors, the value of Beaver Lake Subdivision was with the lots, and that he did not ascribe any market value to the common areas. That was because 100 percent of the use of these areas was reserved to the lot owners; therefore, the value of the common areas was reduced by 100 percent. Finally, it was his opinion that the valuations of these common areas for tax purposes would be nominal only, and he gave as his opinion that the fair valuations at the most would be 10 percent across the board of the valuations actually fixed by the Board. He stated that the fact that the Association had actually paid $662,000 for these areas in 1977 would "not necessarily" affect his thinking as to the fair tax value. He did concede that if the Association were to sell the common areas

there would be a basis for a value, but that he could not imagine anyone paying for these areas because they are without marketability.

Finally, Mr. Ault, the county assessor, testified that he had placed a value of $500 per acre on all common areas, plus the value of any personal property located thereon. This was the same value that was placed on all recreation areas in the county. Mr. Ault also testified that he had examined almost every deed of record to the lots in this subdivision and none of them indicated that the purchaser acquired any legal interest in the common areas. He concluded his testimony on direct examination by counsel for the Board by stating that the valuations placed on these common areas by his office and the Board were just and proper.

Counsel for the Association brought out, on cross-examination of Mr. Ault, that a residential subdivision in Cass County called Copper Dollar Cove had a privately owned lake and that it was leased to the property owners for a base rent of $34,250 per year. The witness then stated that the $500 per acre figure for recreational land, to the best of his knowledge, was established by the State of Nebraska in guidelines to be used by counties in eastern Nebraska. When questioned further, Mr. Ault admitted he could not quote the exact guideline or letter setting forth the $500 per acre value.

We are able to draw several conclusions of fact from the evidence which we have set forth above. The Association members are entitled to use the various common facilities, including the lake, and although such use is not designated as exclusive, there are no provisions in any of the documents permitting others this same privilege. However, the Association reserves the use of the various facilities for its corporate purposes without limitation, and is the owner of such facilities. There is no prohibition on the sale of the common areas and no restriction on the uses to which

they may be put, such sale or modified use being subject only to the approval of the board of directors or the membership. The likelihood of such sale or change in use to the detriment of the members is highly unlikely. However, there is nothing to prohibit the Association from concluding that it would be in the best interests of its membership to sell the common areas and lease them back for an annual rental similar to the arrangement existing with regard to Copper Dollar Cove.

We find it necessary to examine in some detail a number of cases cited by the Association in support of its position.

Depart. of Revenue v. Morganwoods Greentree, Inc., 341 So. 2d 756 (Fla. 1976), involved the taxation of common areas in a townhouse development. While the developer retained the title to the common areas similarly to the present situation, those areas were held "subject to the declaration which grants to each resident lot owner *express easements* for recreation, ingress and egress, lateral support, and vehicular parking." (Emphasis supplied.) *Id.* at 757. The Florida court concluded that the common areas were an "integral part of the residential units," *Id.* at 759, and therefore a proper assessment would be achieved when "the assessed value of the individual units and the assessed value of the common areas equal the total just value of the lands and improvements comprising the total project." *Id.* at 758. The presence of the express easements restricting the title to the common areas distinguishes *Morganwoods* from the present action.

A somewhat closer question is presented by the case of *Matter of Crane-Berkley Corporation v. Lavis*, 238 App. Div. 124, 263 N.Y.S. 556 (1933). There a development contained two parcels of land designated on plat maps filed with the village for parks and playgrounds. The deeds to the purchasers of the lots within the development contained the following

language: "'The fee of the two parcels of land marked "Park" on the said map is reserved by the Crane-Berkley Corporation, the party of the first part hereto, and is not conveyed to the party of the second part. These two parcels of land so marked "Park" shall be restricted by the party of the first part for park purposes and for such other outdoor recreational and similar purposes as the Crane-Berkley Corporation may from time to time determine as proper uses thereof . . . .'" *Id.* at 126, 263 N.Y.S. at 559.

The New York court agreed with the developer that it did not retain any beneficial interest in the parklands and therefore could not be taxed thereon. The court based its determination upon the fact that the developer was "estopped for all time from denying to its grantees the use and enjoyment of the parks in the development as shown on its [recorded] plan." *Id.* at 127, 263 N.Y.S. at 560. Compare this with the language found in the lot purchase agreement furnished by the Association here, "Seller reserves the use of the lake and other facilities for its corporate purposes without limitation," and the membership agreement, "Understanding that the Association is . . . the owner of the roads, water and sewer facilities, lake . . . ." It is clear that this latter language is significantly less restrictive since the Association may use the common areas for "its corporate purposes *without limitation.*"

Another case cited by the Association is *Supervisor of Assess. v. Bay Ridge*, 270 Md. 216, 310 A.2d 773 (1973). However, the distinguishing feature of that case is that the deeds to beachfront lot owners expressly granted the owners either access and right-of-way to the beach or the right to prohibit any building on the beachfront by the developer or subsequent owner.

In upholding the contention of the trustees of an estate that the parkland owned by them was not

marketable and therefore possessed no taxable value, the New Jersey Superior Court, Appellate Division, noted that "the terms of Mr. Allison's will and the legal history of the trust make it most doubtful that any sale of park land for ordinary business or residential use would ever be approved by the courts, no matter how large a price might be offered by the prospective buyer." *Englewood Cliffs v. Estate of Allison*, 69 N.J. Super. 514, 523, 174 A.2d 631, 636 (1961). The same cannot be said with regard to the terms contained in the documents now before this court.

Two developments, which included golf courses, sought to be valued for tax purposes were involved in *Tualatin Development v. Dept. of Rev.*, 256 Or. 323, 473 P.2d 660 (1970), and *Twin Lakes Golf Club v. King County*, 87 Wash. 2d 1, 548 P.2d 538 (1976). In the former case, in finding that the golf course had no value and therefore was not taxable, the Oregon court noted that the developer could never sell the course free of the zoning restrictions wherein the course was designated an "open area," and even if it could, the lot owners could claim estoppel to prevent such alteration due to the representations made to the purchasers of the lots as to the character and use of the land. In *Twin Lakes*, there was a reference in the deed to each lot owner that they would have a right to use and enjoy the golf course. No such restrictive zoning ordinance or deed provision has been brought forward in the present action.

Bd. of Review v. Property Tax Appeal Bd., 91 Ill. App. 3d 117, 414 N.E.2d 173 (1980), involved a fact situation almost identical to the issue now before this court. The taxing authority attempted to assess the value of a lake owned and maintained by a property owners' association for the exclusive use of its members. The deed of the lake property to the association contained a reverter clause which would be activated if the association sold the lake, ceased its corporate activi-

ties, or allowed nonmembers to use the lake.

In response to the claim that the reverter clause rendered the lake unmarketable, the court noted that the statutes required all land to be taxed at "fair cash value" and responded, "This standard presupposes that the property is available for sale on the market and that there are buyers interested in purchasing it; it does not, however, permit an assessing body to give consideration to legal restrictions on the use of the property or infirmities in the title of the taxpayer." *Id.* at 121, 414 N.E.2d at 176.

In response to the second contention, that the lots adjoining the lake absorbed any value the lake might have had, the court replied as follows: "It is apparent that property adjoining or in close proximity to a body of water, a park, golf course or other scenic view may well have an increased value because of its location. However, there is no assessment principle in Illinois which provides that the assessed value of the scenic property may itself be correspondingly reduced because of its effect on surrounding property." *Id.* at 122, 414 N.E.2d at 176. Similarly, this court is unable to find such an assessment principle in Nebraska.

The grant of use privileges claimed by the Association in favor of the lot owners in the common areas lacks sufficient formality, definition, and duration of creation to constitute valid restrictions. As a result, the premise upon which the Association's witnesses based their opinions, that 100 percent of the value of the common areas had evaporated, is unsound and the conclusions unwarranted. Accordingly, the Association is left with no competent evidence with which to refute the presumption of regularity enjoyed by the Board in making its assessment.

The judgment of the District Court is correct and is affirmed.

AFFIRMED.

McCOWN, J., concurs in the result.

ROLAND K. BERGLUND, APPELLANT, V. RUTH G. SISLER ET AL., APPELLEES.

313 N.W.2d 679

Filed December 28, 1981. No. 43534.

1. **Adverse Possession.** One who claims title by adverse possession must prove by a preponderance of the evidence that he has been in actual, continuous, exclusive, notorious, and adverse possession under claim of ownership for a full period of 10 years.
2. **Adverse Possession: Words and Phrases.** Claim of right or claim of ownership means hostile, and these terms describe the same element of adverse possession.
3. **Adverse Possession: Intent.** Ordinarily the intent with which the occupier possesses the land can best be determined by his acts and the nature of his possession.
4. **Adverse Possession: Intent: Statute of Limitations.** The statute of limitations will not run in favor of an occupant of real estate unless the occupancy and possession are adverse to the true owner and with the intent and purpose of the occupant to assert his ownership of the property.

Appeal from the District Court for Buffalo County: DEWAYNE WOLF, Judge. Affirmed.

Michael R. Snyder of Tvrdik, Brandt & Snyder for appellant.

Ross, Schroeder & Fritzler for appellees.

Heard before BOSLAUGH, MCCOWN, CLINTON, and BRODKEY, JJ., and BLUE, District Judge.

MCCOWN, J.

This is a quiet title action based on a claim of adverse possession. The District Court found that the possession of plaintiff's predecessor was not hostile or adverse as to the defendant Sisler and dismissed plaintiff's petition. Plaintiff has appealed.

In 1962 plaintiff's predecessor in title, Ray Schroeder, purchased approximately 16.6 acres of land in the southeast quarter of Section 32, Township 9 North, Range 16 West of the 6th P.M., Buffalo County, Nebraska. This was an irregular tract described by metes and bounds. The tract lay to the north of a loop in the

Kearney canal right-of-way. The south boundary of Schroeder's land was the south line of Section 32. Immediately to the south and between the Schroeder land and the Kearney canal loop was a strip of land approximately 3 acres in size which was located in Section 5, Township 8 North, Range 16 West of the 6th P.M., Buffalo County, Nebraska. The easterly portion of the strip was owned by the predecessors of the other defendants in this action and is no longer involved in this appeal. Approximately 1½ acres in the westerly portion of the strip was owned by the defendant Sisler.

There was no fence between the land in Section 32 or the strip of land in Section 5, nor between that strip and the canal loop right-of-way to the south. When Schroeder purchased the land in Section 32 he knew that his title did not include a strip of land between the south boundary of Section 32 and the Kearney canal loop, but he did not know where the line was. He tried to contact the owners but the records were uncertain and he did not contact anyone. Shortly after Schroeder purchased his land he put up a three-wire fence along the boundary line between the Kearney canal right-of-way and the strip in Section 5, and fenced it in with his property. He plowed some of the property and planted it to grasses. Thereafter, and until 1978, when Schroeder sold his property to plaintiff, Schroeder pastured horses and occasionally other livestock on the disputed strip and used it as a part of the property in Section 32. The record does not show that Schroeder planted or raised any crops on the land in Section 5.

On June 1, 1962, the defendant wrote to Schroeder, stating: "I have been out checking on my building site west of Kearney. I find that you have fenced my land and plowed up my alfalfa.

"Unless you desire to purchase this site from me, it will be necessary that you remove your fence, and reimburse me for my alfalfa."

In response to that letter, Schroeder wrote to the defendant on June 12, 1962. The letter stated: "I have

yours of June 1st with reference to the plot of ground that joins mine just west of the canal. As you recall, I have talked with you about this matter and I have every desire to work out some arrangement that would be beneficial to both of us. I have had the abstracter spend considerable time trying to ascertain just what everyone owns and it seems to be quite indefinite. I had no thought in mind when I fenced the ground of trying to claim your land as my own, but at the same time I had no way to ascertain just where your line might be. I would appreciate it very much if you would find out just how much ground you actually own that I have fenced, so we will have some basis on which to negotiate.

"As for the alfalfa, I think you are aware of the fact that there was very little, if any, hay of any value and I think it was far better I plow it up and keep down the weeds than to let it go unattended. There must be some way of ascertaining just where your fence line is and I don't believe the obligation is mine, as I own all adjoining ground and want to keep it in cultivation rather than to let it go to weeds.

"I would be glad to talk to you about this matter anytime you find it convenient."

Schroeder and the defendant had some discussions, largely by telephone, during which Schroeder attempted to purchase the defendant's land, but they could not agree on a price. Negotiations continued for approximately a month after the letter of June 12th. In their last conversation Schroeder told the defendant that if she would stake out the boundary of her property, he would fence around it. Nothing further was done by either party.

The defendant testified at trial that she had no objection to Schroeder running horses on her land because she was holding it as a future residence site at the time, and she believed that Schroeder had indicated that he had no claim on her land. The defendant continued to pay taxes on her land and Schroeder paid taxes on his land in Section 32.

In May 1978 plaintiff contracted to purchase the property in Section 32 from Schroeder, and the contract recited that part of the consideration for entering into the agreement was the representation on the part of Schroeder that Schroeder had adversely possessed the 3 acres of land, more or less, that adjoined the real estate to the south, and that the period of adverse possession was in excess of 10 years. Thereafter, on September 17, 1979, Schroeder executed a quitclaim deed to the plaintiff covering the disputed strip.

The District Court found that Schroeder had established his claim of adverse possession as to the eastern portion of the disputed strip, record owners of which were the defendants other than Ruth Sisler, and quieted title in the plaintiff to that portion of the disputed strip. That land is not involved in this appeal. The court found that as to the defendant Sisler, the letter of June 12 and the evidence negate the hostility of Schroeder's possession and eliminate an essential requirement of adverse possession. The District Court found that until Schroeder substantially changed the nature of his claim and communicated the change in some form to the defendant, a period of adverse possession could not commence as against her. The court therefore dismissed plaintiff's petition as to the portion of the disputed strip owned by the defendant.

Plaintiff contends that actual, continuous, exclusive, and notorious possession for the period of 10 years is sufficient to establish adverse possession where the plaintiff testifies that he intended to claim ownership. Plaintiff relies upon cases in which a fence is constructed as a boundary line between the two properties involved in the dispute. Here the fence was put up on the boundary between defendant's property and a third party's property and there was no fence dividing Schroeder's property from defendant's property at any time. The evidence indicates that no one actually knew where the true boundary line was until the properties were surveyed shortly before this action was instituted.

There are two other facts which are distinctly different in this case than in the usual adverse possession case. First, there is the written acknowledgment by Schroeder, after he had taken possession of the disputed strip, that his occupation of defendant's land was not intended to be hostile as to the defendant. Secondly, after Schroeder took possession of the land, he attempted to purchase the disputed property from the record owner. Some jurisdictions have held that efforts to buy property from the record owner constitute acknowledgment of his superior title and thus disprove adverse possession since there is then no claim of right. See *Kerlin v. Tensaw Land & Timber Comp., Inc.*, 390 So. 2d 616 (Ala. 1980). While we do not adopt that rule, it is obvious that such facts may properly be taken into account in determining the intent with which the occupier possesses the land. It should be noted also that although Schroeder testified that he intended to possess the property adversely, he also admitted that the defendant had probably asked him for money for hay that came off the property, but said that he had not paid her because there was no hay to be taken off. Whether tacit permission to pasture horses on defendant's land might be inferred from the record is not clear.

We have continuously held that one who claims title by adverse possession must prove by a preponderance of the evidence that he has been in actual, continuous, exclusive, notorious, and adverse possession under claim of ownership for a full period of 10 years. *Barnes v. Milligan*, 200 Neb. 450, 264 N.W.2d 186 (1978).

The *Barnes* case is determinative of the issues involved here. In that case we held that the evidence would permit the trial court to find that the occupation by the adverse claimant was not hostile and that the occupiers of the land did not intend to possess as owners. We also held: "Claim of right or of ownership mean hostile and these terms describe the same element of adverse possession. Ordinarily the intent with which the occupier possesses the land can best be determined by

his acts and the nature of his possession. The statute of limitations will not run in favor of an occupant of real estate, unless the occupancy and possession are adverse to the true owner and with the intent and purpose of the occupant to assert his ownership of the property." *Barnes v. Milligan, supra.*

In the case at bar the evidence was sufficient to permit the trial court to find that Schroeder's occupancy of defendant's land was not hostile, and that he did not intend to possess the property adversely as to the defendant.

The judgment of the District Court is affirmed.

AFFIRMED.

LEO EGAN LAND COMPANY, INC., APPELLEE, V. ELIZABETH A. HEELAN, APPELLANT, AND CONNIE ELAINE EGAN ET AL., APPELLEES.

313 N.W.2d 682

Filed December 28, 1981. No. 43640.

1. **Adverse Possession.** Where one enters into and holds possession of land under an executory contract of purchase or bond for title, his entry and possession are in subordination to, and not adverse to, the rights of the vendor or of those holding under him. In such case a privity exists which precludes the idea of a hostile tortious possession pending the completion of the contract which can silently ripen into title by adverse possession under the statute of limitations. The vendee is equitably estopped from claiming that the possession is adverse. Where the entry is under such circumstances, the possession retains its subordinate character until payment or performance of all conditions by the vendee or until he surrenders the possession which he has had under the agreement or until he has distinctly and unequivocally repudiated the title of his vendor and such repudiation has been brought either expressly or by legal implication to the vendor's knowledge, or until execution of a conveyance by the vendor to the vendee terminating the executory character of their relationship.
2. ____. Where the purchaser of real estate under a verbal contract of sale is put in possession by the vendor under an oral agreement for the payment of the purchase price thereafter, the possession of the vendee will not become adverse until payment in full of the agreed consideration.

Appeal from the District Court for Sheridan County:

ROBERT R. MORAN, Judge. Reversed and remanded.

Michael V. Smith of Smith, King & Waite for appellant.

Tye, Worloc, Tye, Taylor & Hopkins for appellee Leo Egan Land Co.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and HASTINGS, JJ.

KRIVOSHA, C.J.

Appellant, Elizabeth A. Heelan (Heelan), appeals from a judgment entered by the District Court for Sheridan County, Nebraska, finding that the appellee, Leo Egan Land Company, Inc. (Egan), had acquired title to certain land involved in this action by adverse possession. We believe that the record in this case requires that the action of the trial court be reversed.

The record discloses that in 1934 and 1935 Elizabeth A. Egan acquired title by purchase to certain land in Sheridan County, Nebraska, described as the south half of Section 2, all of Section 10, and the north half of Section 11, all in Township 25 North, Range 41 West of the 6th P.M. She died intestate a widow on August 15, 1950, leaving surviving five children, one of whom was the appellant Heelan. The other children were Mary Rock, Kathryn Bunner, Thomas J. Egan, and Leo Egan.

Leo Egan was appointed special administrator of his mother's estate. While some claim is made that the appointment of Egan as special administrator is significant in the decision of this case, we find that his appointment was only with regard to certain personal property and is not relevant to the decision in this case.

On May 3, 1951, Leo Egan filed and recorded a "statement of ownership" with the Sheridan County clerk, claiming that he had acquired equitable title to the Sheridan County land in question at the times it had been purchased by his mother in 1934 and 1935. The "statement of ownership" read as follows: "STATEMENT OF OWNERSHIP State of Nebraska, Grant

County, ss

"KNOW ALL MEN BY THESE PRESENTS: That the undersigned, Leo Egan, does hereby certify that he is the owner of and in possession of the following described real estate situated in Sheridan County, Nebraska, to-wit: South One-half (S ½) of Section Two (2); All of Section Ten (10) and North One-half (N ½) of Section Eleven (11), all located in and a part of Township Twenty-five (25) North, Range Forty-one (41), West of the Sixth Principal Meridian, Sheridan County, Nebraska, together with all the tenements, hereditaments and appurtenances thereunto appertaining, and in support of such claim of ownership does further state and represent:

"That the undersigned acquired equitable title to said real estate at the time said land was purchased from the former title holders notwithstanding the fact that such record title ownership was placed in the name of Elizabeth A. Egan in that the said Elizabeth A. Egan took title to said real estate in order to secure an indebtedness due her from the undersigned in the sum of $4000.00, being the purchase price of said real estate; that the said Elizabeth A. Egan loaned and advanced to the undersigned said purchase price, and by mutual agreement title to said real estate was placed in Elizabeth A. Egan pending the payment of said purchase price; that said deed to Elizabeth A. Egan was in truth and in fact a mortgage and not a deed of conveyance in so far as it conflicted with the rights of the undersigned;

"That the undersigned further certifies that he immediately went into possession of said real estate and every part thereof from and after the date that title to said real estate was placed in the name of Elizabeth A. Egan and continued in such possession for more than fifteen years last past claiming rights of ownership in said land adverse to all the world, and which claims were not contested by the said Elizabeth A. Egan although she was well aware such claims were being

made by the undersigned, the said Elizabeth A. Egan expressly representing to the undersigned that she would convey said real estate and place legal title in the undersigned as the owner thereof at any time he should pay said purchase price;

"That the undersigned further certifies that *there yet remains unpaid the principal sum of $4000.00 representing the purchase price, which said sum was due to Elizabeth A. Egan during her lifetime and is now due to her estate;* that the undersigned is ready, willing and able to pay said sum of $4000.00 to the heirs of Elizabeth A. Egan at any time upon demand of said heirs so to do;

"That the undersigned further makes this statement for the purpose of making legal showing as to his equitable interest in the land and for the purpose of apprising any person dealing in or with said land of the adverse claims the undersigned has in said real estate as the equitable title owner thereof notwithstanding the legal title to said real estate being in the said Elizabeth A. Egan.

"IN WITNESS WHEREOF, I have hereunto set my hand this 2nd day of May, 1951, at Hyannis, Grant County, Nebraska. /s/ Leo Egan." (Emphasis supplied.)

On March 11, 1952, Heelan filed and recorded a denial of Leo Egan's claim of ownership to the real estate with the Sheridan County clerk.

Mary Rock conveyed her interest in the real estate to Leo Egan on August 25, 1972, and Kathryn Bunner conveyed her interest in the land to Leo Egan Land Company, Inc., a successor to the interest of Leo Egan, on July 31, 1975, and their interests are not involved in this action. Leo Egan conveyed all of his interest in the land to Leo Egan Land Company, Inc., on June 10, 1975.

Egan concedes in its brief that during Elizabeth A. Egan's life Leo Egan's possession of the land could not have been termed adverse because it was under agreement with her. It argues, however, that after her death and the filing by Leo Egan of the statement of owner-

ship of property and tender of the purchase price to the heirs in 1951, the possession became adverse and 10 years thereafter ripened into ownership. The difficulty with that argument is that Egan fails to recognize that by Leo Egan's own statement his continued possession following his mother's death was still under his agreement with her. His affidavit specifically maintained that he had equitable title under a purchase agreement which, in the first instance, belonged to his mother and upon her death, according to his own affidavit, was held and owned by his mother's heirs.

In *Gramann v. Beatty*, 134 Neb. 568, 279 N.W. 204 (1938), we were presented with a case similar to the instant one. In *Gramann* certain property was purchased by two individuals in 1916. For 3 years they jointly operated a garage on the property. In 1919 one of the joint owners sold his interest to the other joint owner, under contract. The party to whom the property was sold contended that the selling partner had received compensation for the property over a period of years.

A dispute arose as to whether the consideration for the contract had indeed been paid, the selling partner maintaining that it had not and the buying partner claiming that it had.

The buying partner argued, however, that in any event he had been in possession of the land for more than 10 years and had acquired title by adverse possession. In rejecting such claim, this court said at 572-73, 279 N.W. at 206: "'It is a well settled general rule that where one enters into and holds possession of land under an executory contract of purchase or bond for title, his entry and possession are in subordination to, and not adverse to, the rights of the vendor or of those holding under him. In such case a privity exists which precludes the idea of a hostile tortious possession pending the completion of the contract which can silently ripen into title by adverse possession under the statute of limitations. * * * The vendee is equitably

estopped from claiming that the possession is adverse. * * * Where the entry is under such circumstances, the possession retains its subordinate character until payment or performance of all conditions by the vendee or until he surrenders the possession which he has had under the agreement or until he has distinctly and unequivocally repudiated the title of his vendor and such repudiation has been brought either expressly or by legal implication to the vendor's knowledge, or until execution of a conveyance by the vendor to the vendee terminating the executory character of their relationship.'"

In *Gramann* at 573, 279 N.W. at 206, we further cited with approval *Lanham v. Bowlby*, 86 Neb. 148, 125 N.W. 149 (1910): "'Where the purchaser of real estate under a verbal contract of sale is put in possession by the vendor under an oral agreement for the payment of the purchase price thereafter, the possession of the vendee will not become adverse until payment in full of the agreed consideration.'" Accord, *Tillson v. Holloway*, 94 Neb. 635, 143 N.W. 939 (1913).

Had Leo Egan, when he filed his "statement of ownership," contended that he no longer had any obligation under the purchase contract for whatever reason and was claiming adverse possession merely by virtue of his possession of the land, we might be presented with a different situation. That, however, is not the case. Leo Egan specifically acknowledged, when filing his statement of ownership, that he was holding under an executory contract which had not yet been fulfilled. His mere statement in his affidavit that he was willing to pay the purchase price did not constitute the payment of the consideration. His affidavit was simply an acknowledgment that he had come into possession under an executory contract which was not yet fulfilled. Under the recognized law, that statement of ownership was insufficient to start the time running to entitle Leo Egan to claim ownership by adverse possession.

The filing of the statement of ownership was insuf-

ficient to start the statute running in favor of Leo Egan and against Heelan. For that reason the judgment of the trial court finding that Egan had acquired title to the property by adverse possession was in error and must be reversed.

REVERSED AND REMANDED.

CLINTON, J., dissents.

WHITE, J., participating on briefs.

IN RE APPLICATION OF NEBRASKA TRANSPORT CO., INC. NEBRASKA TRANSPORT CO., INC., APPELLANT, V. BEE LINE MOTOR FREIGHT, INC., ET AL., APPELLEES.

313 N.W.2d 686

Filed December 28, 1981. No. 43646.

1. **Public Service Commission: Appeal and Error.** Upon an appeal to this court from an order of the Public Service Commission, the order must be affirmed if the commission acted within its jurisdiction and the order is not arbitrary or capricious. If there is evidence in the record which will sustain the findings and order of the commission, its order must be affirmed.
2. **Motor Carriers: Proof.** An applicant for a certificate of public convenience and necessity must prove that it is fit, willing, and able to perform the service and that the public convenience and necessity requires the service.
3. **Motor Carriers.** In determining the issue of public convenience and necessity, controlling questions are whether the operation will serve a useful purpose responsive to a public demand or need; whether this purpose can or will be served as well by existing carriers; and whether it can be served by applicant in a specified manner without endangering or impairing the operations of existing carriers, contrary to public interest.

Appeal from the Nebraska Public Service Commission. Affirmed.

Lavern R. Holdeman of Peterson, Bowman & Johanns for appellant.

James E. Ryan of Ryan & Williams, P.C., for appellees.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and HASTINGS, JJ.

BOSLAUGH, J.

The applicant, Nebraska Transport Co., Inc., appeals from an order of the Nebraska Public Service Commission denying its application for an extension of its intrastate authority. The applicant is a motor carrier which is authorized as a common carrier to carry commodities generally, except those requiring special equipment, between points and places in Box Butte, Morrill, Scotts Bluff, Dawes, Sioux, and Sheridan Counties, on the one hand, and, on the other hand, all points and places in Nebraska, over irregular routes. The applicant sought to extend this authority to include Banner, Cheyenne, and Kimball Counties.

Bee Line Motor Freight, Inc., Brown Transfer Co., and Nebraska-Iowa Xpress, Inc. (NIX), all filed protests to the application.

After a lengthy hearing the commission, on January 15, 1980, denied the application. A petition for reconsideration and/or rehearing was filed, and on February 20, 1980, with two commissioners dissenting, the commission granted the application. Another motion for rehearing and/or reconsideration was filed, and on March 18, 1980, the commission, with one commissioner dissenting and one commissioner abstaining, sustained the motion and set aside its order of February 20, 1980.

On July 8, 1980, the commission, with one commissioner dissenting, reinstated the order of January 15, 1980, denying the application. It is from that order that the applicant has appealed.

Upon an appeal to this court from an order of the Public Service Commission, the order must be affirmed if the commission acted within its jurisdiction and the order is not arbitrary or capricious. If there is evidence

in the record which will sustain the findings and order of the commission, its order must be affirmed.

The rules which govern a proceeding of this nature before the commission are well established. The applicant was required to prove that it was fit, willing, and able to perform the service required in the area and that the public convenience and necessity required the service. Neb. Rev. Stat. § 75-311 (Reissue 1976). The commission found that the applicant was fit, willing, and able to perform the proposed service but that the present or future public convenience and necessity did not require the proposed service.

In determining the issue of public convenience and necessity, controlling questions are whether the operation will serve a useful purpose responsive to a public demand or need; whether this purpose can or will be served as well by existing carriers; and whether it can be served by applicant in a specified manner without endangering or impairing the operations of existing carriers, contrary to public interest. *In re Application of Greyhound Lines, Inc.*, 209 Neb. 430, 308 N.W.2d 336 (1981).

The applicant presented the testimony of 34 witnesses, who testified in support of the application. In their prepared testimony these witnesses testified that they desired to have the applicant's service available to them and expressed dissatisfaction with the existing service. On cross-examination, however, these witnesses testified, generally, that the existing service was satisfactory, or better.

The witnesses for the protestants testified, generally, that the volume of freight moving to the three counties involved in the application was relatively small and that any diversion of traffic from the existing carriers would impair their ability to continue service to the area.

The major population centers in the three-county area are Sidney, Nebraska, and Kimball, Nebraska. Banner County has a population of approximately

1,000 persons. All of the protestants serve Sidney, Nebraska. Brown and NIX serve all Cheyenne County points. NIX serves both Kimball, Nebraska, and Harrisburg, Nebraska, the only town in Banner County.

The finding of the commission that there was not sufficient volume of traffic to support the service of another carrier in addition to those presently authorized to serve the three-county area is supported by the record.

Much of the dissatisfaction expressed in regard to existing service related to the inability of the existing carriers to provide overnight service on shipments originating outstate. The evidence shows that the volume of shipments into the three-county area originating outside of Omaha is so small that it would not support direct service. As a result, such shipments are interlined with other carriers between the originating point and Omaha, and then carried to the three-county area by one of the protestants. Of necessity, this arrangement usually prevents overnight service from most outstate points into the three-county area.

The finding of the commission that the present or future public convenience and necessity does not require the proposed service is supported by substantial evidence. The order was not arbitrary or capricious and must be affirmed.

AFFIRMED.

WHITE, J., participating on briefs.

MARY CUSHING, MOTHER AND NEXT FRIEND OF KEVIN CUSHING, APPELLANT, V. TROY BERNHARDT, A MINOR, APPELLEE.

313 N.W.2d 688

Filed December 28, 1981. No. 43682.

Appeal from the District Court for Scotts Bluff County: ALFRED J. KORTUM, Judge. Affirmed.

Jim Zimmerman of Atkins, Ferguson, Hahn, Zimmerman & Carney for appellant.

Van Steenberg, Brower, Chaloupka, Mullin & Holyoke for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

PER CURIAM.

Kevin Cushing was a passenger in an automobile operated by Troy Bernhardt on May 24, 1978, when the automobile struck a tree. This action by his next friend was brought against Bernhardt to recover the damages resulting from the injuries Kevin sustained in the accident. The trial court sustained a demurrer and dismissed the petition because it failed to allege gross negligence.

The appeal presents only the question of whether the guest statute, Neb. Rev. Stat. § 39-6,191 (Reissue 1978), is unconstitutional. Our decisions in *Kreifels v. Wurtele*, 206 Neb. 491, 293 N.W.2d 407 (1980), and *Botsch v. Reisdorff*, 193 Neb. 165, 226 N.W.2d 121 (1975), are controlling on this issue.

The judgment of the District Court is, therefore, affirmed.

AFFIRMED.

KRIVOSHA, C.J., dissenting.

For the reasons more particularly set out in my dissent in *Kreifels v. Wurtele*, 206 Neb. 491, 293 N.W.2d 407 (1980), I likewise dissent in this case. I would hold the guest statute to be in violation of the Constitution of the State of Nebraska and the Constitution of the United States.

I am authorized to state that Judges McCown and White join in this dissent.

DALE ALAN KENNEDY, APPELLANT, V. BOARD OF EDUCATION OF THE ALLEN CONSOLIDATED SCHOOLS, DISTRICT NO. 70-70A IN THE COUNTY OF DIXON, IN THE STATE OF NEBRASKA, A POLITICAL SUBDIVISION, APPELLEE.

314 N.W.2d 14

Filed December 28, 1981. No. 43716.

1. **Administrative Orders: Appeal and Error.** In an error proceeding, the order of an administrative body must be affirmed if it acted within its jurisdiction and there is some competent evidence to sustain its findings.
2. ____: ____. The burden is on the plaintiff to show there is no competent evidence to support the order sought to be reversed. Conflicting evidence will not be weighed, and the order must be affirmed if there is competent evidence to sustain it.

Appeal from the District Court for Dixon County: FRANCIS J. KNEIFL, Judge. Affirmed.

Robert A. Wichser of Hirschbach & Wichser for appellant.

Jewell, Otte, Gatz, Collins & Domina for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

BOSLAUGH, J.

This is an appeal in a proceeding in error to review an order of the Board of Education of the Allen Consolidated Schools, District No. 70-70A, Dixon County, Nebraska, terminating the contract of the plaintiff. The trial court found that there was substantial evidence to sustain the order of the Board and affirmed the order. The plaintiff has appealed.

The plaintiff had been employed as a principal and guidance counselor by the defendant Board since 1975. In 1978 the plaintiff was awarded a 2-year contract. In 1980 the Board notified the plaintiff that it considered his performance to be unsatisfactory. Pursuant to Neb. Rev. Stat. § 79-1254 (Reissue 1976), the Board held a hearing on March 12, 1980, to determine whether it had

just cause to terminate the plaintiff's employment at the expiration of his contract. After the hearing, the five members of the Board who were present voted to terminate the contract. The plaintiff then commenced this action to reverse and vacate the order of the Board.

Under § 79-1254, just cause means "incompetency, neglect of duty, unprofessional conduct, insubordination, immorality, physical or mental incapacity, other conduct which interferes substantially with the continued performance of duties." The defendant's letter to the plaintiff alleged that he had failed to cooperate "'with school officials and law enforcement agencies concerning an incident involving damage to and theft of school property. A disreputable course of conduct toward the superintendent and the teaching staff. Your failure to follow procedures set forth by the office of the superintendent and the Board of Education. Your unprofessional conduct. Your failure, at the Board of Education meeting July 9, 1979, to advise the Board that the school bus 73-B was in the process of being repaired at a substantial cost when the Board considered and took action to sell the bus and your failure to properly conduct your assignment as bus supervisor.'"

In an error proceeding, the order of an administrative body must be affirmed if it acted within its jurisdiction and there is some competent evidence to sustain its findings. *City of Omaha Human Relations Dept. v. City Wide Rock & Exc. Co.*, 201 Neb. 405, 268 N.W.2d 98 (1978).

The burden is on the plaintiff to show there is no competent evidence to support the order sought to be reversed. Conflicting evidence will not be weighed, and the order must be affirmed if there is competent evidence to sustain it. *Davis v. Board of Education*, 203 Neb. 1, 277 N.W.2d 414 (1979).

There was evidence before the Board in this case from which the Board could find that the plaintiff had failed to maintain discipline on a number of occasions; that

the teachers employed by the district had lost confidence in the plaintiff and were unwilling to discuss problems with him; that he had become ineffective in his relations with the staff; and that he had failed to cooperate with the Board in a number of instances.

Perhaps the most serious complaint involved the refusal of the plaintiff to cooperate in regard to an investigation concerning the disappearance of two telephones and a control box for the public address system from the school. Apparently, the plaintiff was in the school building on a Saturday evening, April 7, 1979, at or about the time the equipment disappeared and saw four students in the hall, three boys and a girl, carrying objects which were concealed by wrappings. When first interviewed by the sheriff, the plaintiff stated he had not seen anyone in the building. Later, he stated he had seen students in the building but refused to identify them to the sheriff, the superintendent, or the Board. The plaintiff's testimony at the hearing concerning the incident was quite unsatisfactory, conflicting in some respects, and demonstrated a failure and refusal to cooperate with the sheriff and the Board in the investigation of the matter.

The record shows there was competent evidence before the Board to sustain its order. The judgment of the District Court is affirmed.

AFFIRMED.

JUDITH M. SODDERS, APPELLEE, V.
WILLIAM E. SODDERS, APPELLANT.

313 N.W.2d 927

Filed December 28, 1981. No. 43748.

Appeal from the District Court for Douglas County: PAUL J. HICKMAN, Judge. Affirmed.

Jerry David Slominski for appellant.

Robert K. Silverman of Silverman & Silverman for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

PER CURIAM.

This is an appeal in forma pauperis from an order of the District Court denying appellant's application to reduce a judgment of $450 per month child support entered by agreement and stipulation of the parties in a dissolution of marriage proceeding on August 22, 1979.

The record shows that on May 9, 1980, a trust account in the sum of $17,695.99 was established by stipulation of the parties in the name of a trustee for the appellant husband which is subject to withdrawal by written agreement of the parties or pursuant to court order, and that the child support judgment of $450 per month is presently being paid from that account.

The husband's application to modify the child support judgment rests upon his claim of a material change in his financial circumstances. The appellant was found guilty of attempting to have his wife murdered and his resulting incarceration and consequent loss of income form the basis for his application to reduce the child support judgment.

This appeal is a domestic relations matter within the ambit of our rules for summary disposition.

The court, having reviewed the record in this case de novo, agrees with the result reached by the trial court. The judgment is affirmed.

AFFIRMED.

EDWARD L. MCCURRY, APPELLANT, V. YOUNG MEN'S CHRISTIAN ASSOCIATION, DOING BUSINESS AS MILLER PARK BRANCH, YMCA, APPELLEE.

313 N.W.2d 689

Filed December 28, 1981. No. 43830.

1. **Licensee: Words and Phrases.** One who, solely for his own personal pleasure, convenience, or benefit, enters the premises of another with the consent of the latter but without an invitation, express or implied, is a bare licensee.
2. **Negligence: Licensee.** The owner or occupant of property owes to a licensee the duty only to refrain from injuring him by willful or wanton negligence or a designed injury, or by failure to warn of a hidden danger or peril known to the owner or occupant but unknown to or unobservable by the licensee in the exercise of ordinary care.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Affirmed.

Jarve L. Garrett for appellant.

Thomas J. Shomaker of Sodoro, Daly & Sodoro for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

PER CURIAM.

The plaintiff, Edward L. McCurry, was injured on March 27, 1977, when he fell while playing basketball on an outdoor asphalt playground owned by the defendant, Young Men's Christian Association. He brought this action to recover for the damages he sustained by reason of his injuries in the accident.

The second amended petition alleged the defendant was negligent in failing to properly maintain the surface of the playground and in failing to warn the plaintiff of the dangerous condition of the surface of the playground. The answer alleged the plaintiff was contributorily negligent and had assumed the risk of injury.

At the close of the plaintiff's evidence, the trial court sustained the defendant's motion for a directed verdict and dismissed the plaintiff's petition. The plaintiff has appealed.

The claimed defect in the surface of the playground was a depression in the surface of the asphalt, described by the plaintiff as 2 to 3 feet long, 2 to 3 inches wide, and 1½ to 2 inches deep. There was no evidence as to how long the defect had existed or when the defendant may have known about it.

The playground itself was fenced. There were two gates in the fence, one of which was padlocked. The other gate was open.

The plaintiff was 33 years of age. Although the plaintiff had played on the playground approximately once a week during the summer of 1976, he was not a member of the YMCA and had not obtained any express permission to use the playground.

The day of the accident was a "nice, warm day." After the plaintiff had entered the playground, he took a couple of practice "shots" before the game began. There were five other players participating in the game. According to the plaintiff, he had received the ball, had faked another player out of position, and was going toward the basket when he fell. Upon direct examination the plaintiff testified as follows: "Q. You indicated that you were going towards the basket and you fell; is that correct? A. Yes. Q. Now, after you fell did you determine what you had fell on? A. It was a — Q. Did you determine that, did you determine after you fell what you fell on, yes or no? A. I didn't know what it was that I fell on. After I got up I started to pain, I couldn't walk." It is quite clear from the record that the plaintiff did not know what caused him to fall, but noticed the depression after the accident and concluded that it must have been the cause of the accident.

William John Pilcher, a former brother-in-law of the plaintiff, was playing in the game at the time the

plaintiff was injured. According to Pilcher the accident happened when the plaintiff was "going for a layup." Pilcher testified, "He just went up and he just -- he just went, just went down."

The second amended petition alleged that the plaintiff was a "patron and invitee" on the playground at the time of the accident. The evidence is undisputed, however, that the plaintiff was not a member of the YMCA and had not obtained express permission to use the playground. Although the defendant did not prevent the plaintiff and others from using the playground, there is no evidence of an invitation to the public to use the playground.

One who, solely for his own personal pleasure, convenience, or benefit, enters the premises of another with the consent of the latter but without an invitation, express or implied, is a bare licensee. *Kruntorad v. Chicago, R. I. & P. R. Co.*, 111 Neb. 753, 197 N.W. 611 (1924). Under the circumstances in this case, the plaintiff had the status of a licensee and was not an invitee.

The owner or occupant of property owes to a licensee the duty only to refrain from injuring him by willful or wanton negligence or a designed injury, or by failure to warn of a hidden danger or peril known to the owner or occupant but unknown to or unobservable by the licensee in the exercise of ordinary care. *Hackney v. Klintworth*, 182 Neb. 219, 153 N.W.2d 852 (1967); *Presho v. J. M. McDonald Co.*, 181 Neb. 840, 151 N.W.2d 451 (1967).

If we assume for the purpose of discussion that the depression in the surface of the playground was a defect, the evidence is clear that it was open and obvious. It was not a hidden danger or peril, but was something the plaintiff could have readily discovered by the exercise of even slight care. There was no evidence of willful or wanton negligence or a designed injury.

The evidence failed to show a breach of any duty owed to the plaintiff by the defendant for which the

plaintiff could recover for his damages. The order dismissing the petition at the close of the plaintiff's evidence was not erroneous.

The judgment of the District Court is affirmed.

AFFIRMED.

BRODKEY, J., dissenting.

I cannot emphasize too strongly that the issue to be decided by us in the pending appeal to this court is *not* whether the plaintiff is entitled to recover on the merits of his action under the evidence adduced at the trial but, rather, whether the plaintiff was entitled to have his evidence submitted to the jury for its determination on the issues involved in the case. It must be remembered that this case was not submitted to the jury for its determination; but, on the contrary, the trial court sustained the defendant's motion for a directed verdict at the close of the plaintiff's evidence, and dismissed plaintiff's petition. Inasmuch as the majority opinion fails to set out or discuss the well-settled rules of law applicable to motions for directed verdicts and dismissal of actions, I shall now do so, as the correct determination of this appeal depends upon the legal principles involved, following which I will review the pertinent evidence contained in the record which I am convinced clearly required the submission of the case to the jury.

The following principles of law are well established in Nebraska. "A motion for directed verdict or its equivalent must for the purposes of decision thereon be treated as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence." *Presho v. J. M. McDonald Co.*, 181 Neb. 840, 841, 151 N.W.2d 451, 453 (1967). See, also, *Crawford v. Soennichsen*, 175 Neb. 87, 120 N.W.2d 578 (1963); *Costello v. Simon*,

180 Neb. 35, 141 N.W.2d 412 (1966); *Syas v. Nebraska Methodist Hospital Foundation*, 209 Neb. 201, 307 N.W.2d 112 (1981). "A trial court should direct a verdict as a matter of law only when facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom." *Krug v. Laughlin*, 208 Neb. 367, 371, 303 N.W.2d 311, 313 (1981). When different minds may reasonably draw different conclusions from the same facts as to whether they establish negligence or contributory negligence, such issues should be submitted to the jury. *Beck v. Trustin*, 177 Neb. 788, 131 N.W.2d 425 (1964); *Buie v. Beamsley*, 171 Neb. 181, 105 N.W.2d 738 (1960). "'In determining the question of whether the evidence is sufficient to submit the issues of negligence and contributory negligence to the jury, a party is entitled to have all conflicts in the evidence resolved in his favor and the benefit of every reasonable inference that may be deduced from the evidence, and if reasonable minds might draw different conclusions from a set of facts thus resolved in favor of a party, the issues of negligence and contributory negligence are for a jury.'" *Moats v. Lienemann*, 188 Neb. 452, 454, 197 N.W.2d 377, 379 (1972).

In determining the duty owed by the defendant in this case to the plaintiff, it is first necessary to determine the status of the plaintiff on the premises in question at the time plaintiff was injured. We have held that the law places those who come upon the premises of another in three classes: Briefly defined, invitees are those who are expressly or impliedly invited, as a customer to a store; licensees are persons whose presence is not invited, but tolerated; trespassers are persons who are neither suffered nor invited to enter. *Haley v. Deer*, 135 Neb. 459, 282 N.W. 389 (1938). In *Haley* we also stated at 463, 282 N.W. at 392: "The duty of the owner toward an invitee is to exercise reasonable care to keep the premises in a safe condition, but licensees take the

premises as they find them, the only duty of the occupier being to give notice of traps or concealed dangers. Toward trespassers the occupier need only refrain from wilful or wanton injury as modified by the 'attractive nuisance' line of cases." We note, however, that Restatement (Second) of Torts § 332 (1965) divides "invitees" into two subcategories, to wit, business visitors and public invitees. That section defines a "public invitee" as follows: "A public invitee is a person who is invited to enter or remain on land as a member of the public for the purpose for which the land is held open to the public." In its Comment to subsection (2), which sets forth the foregoing definition, the Restatement, at 179, gives the following illustration: "When a landowner tacitly permits the boys of the town to play ball on his vacant lot they are licensees only; but if he installs playground equipment and posts a sign saying that the lot is open free to all children, there is then a public invitation, and those who enter in response to it are invitees.

"Where land is held open to the public, it is immaterial that the visitor does not pay for his admission, or that the possessor's purpose in so opening the land is not a business purpose, and the visitor's presence is in no way related to business dealings with the possessor, or to any possibility of benefit or advantage, present or prospective, pecuniary or otherwise, to the possessor." This court has recognized the "public invitee" category, as set out in the Restatement, in the case of *Hilker v. N. P. Dodge Building Co.*, 184 Neb. 495, 168 N.W.2d 701 (1969), but held in that case that it was unnecessary to determine that question, as a basis for liability was not established either as a "public invitee" or a "licensee."

"Where not only the facts constituting the conduct of the parties, but also the standard of care which they should have exercised, are to be determined, the case is entirely one of fact, to be decided by the jury." 57 Am. Jur. 2d *Negligence* § 7 at 342 (1971). A review of

the evidence in this case, as contained in the record, clearly reveals that there are fact questions requiring determination by the jury, not only as to negligence on the part of the defendant but also whether or not the plaintiff was guilty of contributory negligence, and also whether he had assumed the risk involved by participating in the basketball game on the day in question. Also, I believe the question is presented as to the legal status of the plaintiff on defendant's premises at that time. While the majority opinion purports to set out the facts in this case, I believe that such facts are not complete, and in many respects the evidence on the issues was conflicting and should have been decided by the jury rather than the court. I shall now review the record in this case, and the testimony of the witnesses, and point out certain additional facts and testimony which should be considered.

I shall commence with the testimony of the witness Danny Lohmeier, who was the executive director of the Miller Park Branch, YMCA. He was employed by the defendant from March 1975 to July 1979 and was serving in that capacity on the date of the accident, March 27, 1977. He testified with reference to the basketball court in back of the Miller Park Branch, YMCA, as follows: "Q. . . . Now, is that recreational facility, is that a community center? A. I believe that was the title at one time, yes. Q. And therefore it is accessible to the community; right? A. We tolerated people from the community using that facility. Q. No, but that wasn't my question. My question was, was it accessible to the community? A. The gate was unlocked; yes, sir. Q. At all times? A. To the best of my memory, yes. Q. Mr. Lohmeier, can you recall answering some Interrogatories propounded by myself, answering them on behalf of the Defendant corporation here; do you remember? A. Yes, sir. Q. Can you recall whether there was a padlock on the front gate of the playground surface? A. Yes, there is a padlock there. Q. Was it generally left open? A. Yes. Q. In fact,

was it ever locked? A. Not to my knowledge. Q. Could anybody that wanted to use the court come in and use it? A. Yes, sir. . . . Q. . . . Mr. Lohmeier, can you recall in your Answers to Interrogatories answering a question as to whether or not requests had been made for blacktopping the Y.M.C.A. back there? A. Yes, sir, I do. Q. Can you recall what your answer was to the question whether there had been any requests made? A. I believe my answer was no, there had not been. Q. Other than the initial request? A. Yes, sir. Q. So do you have personal knowledge whether or not any request for repair was made? A. I have no personal knowledge of any request for repair being made. Q. Mr. Lohmeier, did you ever go outside the building and back there on the playground itself? A. While I was an employee of the Miller Park Y? Q. Yes. A. Yes, I did. Q. What was your primary purpose for going back there on those occasions? A. General maintenance. Q. What did that entail? A. Primarily looking for a weed and trash problem, and general cleaning up those specific types activities. Q. While you were looking over the weeds did you have occasion to walk around the playground? A. Yes, sir, I did. Q. How often did you do that in the summer months? A. It would vary. There was no set schedule. I would have to answer approximately every two to three weeks. Q. Mr. Lohmeier, while you were going around looking did you have occasion to know or to look at the surface itself? A. I didn't specifically look at the surface, but, yes, I probably observed the surface. Q. Did you see any evidence of wear and tear on the surface? A. I don't know how to — yes, I suppose. Q. Did you see some evidence of wear and tear on the surface, is my question? A. Yes. Q. Did you see cracks on the asphalt surface? A. Yes, sir, I did, but they — Q. That is all I have asked you. I am handing you what has been labeled and marked as Plaintiff's Exhibit No. 1. I ask that you identify that, if you can. A. It is an impression in asphalt. Q. Did that exist on the playground surface

while you were employed? A. Depending on the time frame, to answer your question, yes. Q. So you did know it was there? A. During my employment, yes. Q. During your period of employment, Mr. Lohmeier, did the Y.M.C.A. put up any signs telling the public to keep out, that you can remember? A. During my employment, yes. Q. Was that before or after the accident occurred? A. It was after. Q. What did that sign say? A. I don't remember the exact wording. To paraphrase it, it said something to the effect 'For Y.M.C.A. members only.' Q. Before that time it had been open to the community; right? A. Yes, sir. Q. Before the filing of this lawsuit? A. Yes, sir. Q. These cracks that you mentioned before you talked about the depression, these cracks that you mentioned, what did they look like? A. My best memory of them is that they were just open cracks in the surface that had weeds sticking out of them that I wanted to get rid of. Q. Can you remember being asked that question on the 6th day of February, 1980, being asked what did they look like, and answering, 'Typical sidewalk cracks that you would see in any type of surface that had weeds growing out of them pretty much'? A. Yes, sir, that is accurate. Q. Was there anything unusual about those cracks? A. Not to my knowledge. Q. And the condition depicted in that picture [exhibit 1], that is not the cracks; right. A. No, sir, that is not."

The foregoing testimony of the executive director of the YMCA is clearly susceptible to the interpretation that the public was tolerated and even invited to use the basketball court in question, and also that the executive director knew of the defective and deteriorating condition of the surface of the court itself. It was for the jury to determine the permissible inferences from such testimony, and the testimony was not such that only one reasonable inference could have been deduced from the evidence.

Plaintiff also called as his witness, Michael Parks, president of James J. Parks Asphalt, an asphalt

contractor. He was asked a hypothetical question with regard to the installation of the asphalt surface of the court in question, based upon previous testimony that 397 tons of asphalt were applied to the surface 90 feet by 100 feet, to which a 3-inch lift was applied, and assuming that the playground surface was laid in 1971, and, also, other facts revealed by previous testimony. He was also shown exhibit 1, which was a picture of the surface of the playground taken shortly after the accident in question. He testified the cracks would probably occur in such a surface within a year or two after it was laid but had no opinion as to when depressions might occur in an asphalt surface. He also explained the difference between a crack and a depression, stating: "Well, a crack would be a severing of the pavement, and it would be like a chasm, which would vary in width; whereas a depression would be a subgrade failure in most cases and it would be a lowering of the slope of the asphalt, or the profile." He expressed the opinion that the depression in question was approximately ½ to 1 inch. He was asked his opinion as to whether the playground in question was a dangerous condition, and replied that, in his opinion, it would be dangerous to use as a playground. He was also asked with regard to the condition revealed by exhibit 1 (the picture): "Q. Do you have an opinion based upon that exhibit that you have before you as to whether or not there has been any maintenance applied to that condition? A. No, none." Without commenting or expressing an opinion as to the weight to be given to the testimony of Mr. Parks, it is clear that there is evidence in the record which should have been considered by the jury as to the dangerous condition of the playground, and also as to the lack of maintenance thereof. This testimony created a permissible inference of neglect, which should have been presented to the jury.

I now review the evidence of the plaintiff McCurry as given at the trial. He did testify that he did not

know what it was that he fell on, but this statement should not be held conclusive with regard to the submission of the evidence to the jury, as the fact in question could be established by circumstantial evidence and the evidence of other witnesses. He also testified that although he was aware of cracks in the surface from previous occasions playing on the court, he did not know there was a depression at the time he was driving toward the basket until it was too late and he ended up lying flat on his face on the depression. Plaintiff was also permitted by the court to express his opinion on the question, and he replied: "Well, I fell into a sunken-in area, it looked to me like, my personal opinion." He was also questioned with regard to the hairline cracks in the surface, and was asked: "Q. Mr. McCurry, on that day, seeing those cracks, did that alarm you and prevent you from playing? A. No. Q. Why? A. I was concerned, but I didn't think it would hinder my playing; in other words, to hurt myself. I am not a masochist." He testified that the depression he was injured on was different from the hairline cracks and that the cracks "were hairline, spread like cancer, and the depression was a sunken-in type of deal." He was shown the picture of the surface taken after his accident and identified exhibit 1 as "the depression where I hurt myself." On cross-examination he again stated that although he had seen the hairline cracks, he had not seen the depression until after he fell. He testified that he was not looking at his feet when he drove to the basketball hoop at the time he fell down. On redirect examination he was asked: "It was the cracks that were long; is that correct? A. The cracks were long, yes. Q. But the cracks were not the depression; right? A. That's correct. Q. It was the depression you got injured on; correct? A. Yes." The foregoing testimony clearly reveals that there was, to say the least, a fact question presented as to what he fell upon and what caused his injury.

Plaintiff also called as a witness one William John

Pilcher, who was one of the participants in the basketball game on the day in question. He testified that he had seen the cracks in question in the surface of the court, but, prior to the plaintiff falling down, he had not noticed any sunken-in areas on the asphalt surface. However, he did after the accident. He stated that he had not seen the sunken-in area before McCurry fell because "I was too busy running around shooting." He was asked: "After the accident occurred, what did you notice, if anything, about the point where Mr. McCurry's left leg had hit the asphalt surface? A. There was a like a little sunken-in area." He was permitted by the court to express his opinion as to the reason for McCurry's falling, and stated: "My opinion was that when he cut for the basket, his foot hit the sunken area and he fell." Since this testimony was in the record, it was entitled to be considered by the jury for its determination as to the weight to be given to the testimony. It is also clear to the writer of this dissent that the question of McCurry's contributory negligence, and also whether under the facts in the record he had assumed the risk, should also have been submitted to the jury. We have held that a duty to warn may arise even though a defect or condition is in fact open and obvious where the circumstances are such that there is reason to believe that the risk of harm involved would not be anticipated or appreciated. *Jensen v. Hawkins Constr. Co.*, 193 Neb. 220, 226 N.W.2d 346 (1975). We have also held that holes, ruts, or depressions in a street or sidewalk may give rise to a right of action for injuries caused thereby if they are of such a nature that danger therefrom might reasonably be anticipated; but that slight holes or depressions which are not in the nature of traps, and from which danger could not reasonably be anticipated, are not defects for which an action will lie. *Christensen v. City of Tekamah*, 201 Neb. 344, 268 N.W.2d 93 (1978). Whether the depression in question was of such magnitude as to constitute a trap would seem clearly

to be a fact question for determination of the jury under the evidence in the record; and the dimensions of the crack or depression in question, whichever it was, were the subject of various estimates by the witnesses who testified. We have also held that a person lawfully on the premises of another assumes dangers which are open and obvious and which can be seen readily and avoided by the exercise of ordinary care. The questions of whether the depression was open and obvious and whether the plaintiff had seen the depression and had assumed the risk were also clearly for the determination of the jury. See *Hilker v. N. P. Dodge Building Co.*, 184 Neb. 495, 168 N.W.2d 701 (1969).

We believe that reasonable minds might well differ on all of the issues we have discussed above, and we have set out in this dissenting opinion evidence which we believe not only justifies but requires the submission of the case to the jury. We are convinced that the trial court erred in directing a verdict for the defendant under the rules set forth at the outset of this dissenting opinion, and that this case should be reversed and remanded for a new trial.

KRIVOSHA, C.J., and WHITE, J., join in this dissent.

GLENN E. BOTSCH ET AL., APPELLEES, V. LEIGH LAND COMPANY, A NEBRASKA CORPORATION, ET AL., APPELLANTS.

313 N.W.2d 696

Filed December 28, 1981. No. 44021.

Nuisances: Injunction. A court of equity will not usually enjoin the operation of a lawful business without regard to how serious may be the grievance caused thereby. In the first instance, at least, it will require the cause of the grievance to be corrected and it will enjoin the conduct of the enterprise perpetually after it has been proved that no application of endeavor, science, or skill can effect a remedy or that the owners cannot be induced to conduct it properly.

Appeal from the District Court for Colfax County: ORVILLE L. COADY, Judge. Reversed and remanded with directions.

Raymond E. Baker and David A. Beck of Baker & Beck, P.C., for appellants.

William A. Wieland of Healey, Brown, Wieland, Kluender, McCord & Atwood for appellees.

Heard before BOSLAUGH, MCCOWN, CLINTON, and BRODKEY, JJ., and STANLEY, District Judge.

MCCOWN, J.

The defendants appeal from an order denying defendants' motion and application for vacation of an injunction enjoining them from operating a feedlot designated as the Leigh Land Company feedlot "in any manner until and unless they can demonstrate, upon proper application and showing, that the same can be done without injury and harm to the plaintiffs as it now exists."

This is the third appearance of this matter in this court. In the first case, which appears at 195 Neb. 509, 239 N.W.2d 481 (1976), under the same title, the background facts are set forth in detail. The trial court in the first case sustained defendants' motion to dismiss plaintiffs' petition at the close of plaintiffs' case on the theory that as a matter of law a nuisance did not exist. This court found that the trial court was in error and reversed and remanded for further proceedings.

In the second case, which appears at 205 Neb. 401, 288 N.W.2d 31 (1980), again under the same title, the plaintiffs' evidence was submitted to the trial court on the bill of exceptions from the first case. The trial court restricted the evidence to the years 1969 to 1974. The defendants did not present evidence to demonstrate how the nuisance-creating factors of feedlot operations shown by the record could be dispensed with. So far as the evidence in this court indicated, however, there had been no change in the operation of the feedlot

since the first case, except that the ponds had been partially drained. The trial court found there was a nuisance, and entered a mandatory injunction requiring the defendants to drain the four waste disposal ponds and prohibiting them from ever using the ponds to hold any "mix of cattle manure and water," and awarded plaintiffs a judgment for $4,800 damages to date of trial. The plaintiffs again appealed. On appeal this court found that the record clearly established that the defendants' feeding operations, conducted and operated as shown by the evidence in the first case and introduced in the second case, constituted a nuisance, and the defendants' failure to introduce evidence that the nuisance-creating factors had been or could be dispensed with by any other means made it necessary to enjoin the conduct of the feedlot enterprise rather than to enjoin only the maintenance of the ponds. Accordingly, this court directed the trial court to enter an order enjoining the defendants "from operating the feedlot in any manner until and unless they can demonstrate, upon proper application and showing, that the same can be done without injury and harm to the plaintiffs as it now exists." The judgment for damages was affirmed. Upon remand the trial court entered the permanent injunction as directed by this court.

Thereafter, the defendants filed their application for an evidentiary hearing and motion for temporary and permanent vacation of the injunction. The third trial followed, and the defendants have appealed from the order of the District Court denying defendants' motion and application for vacation of the injunction.

The evidence shows that there were four waste disposal lagoons across the road to the south of the plaintiffs' residence and that the most objectionable odors referred to in the first case emanated from these lagoons. They are the lagoons or ponds referred to in the trial court's injunction in the second case. The evidence in the case now before us shows that in June of 1977 three of the four lagoons were removed, the

area leveled and graded, and that area, together with a portion of the north part of defendants' feedlot, was converted from feedlot use to pasture. The fourth lagoon farthest away from the plaintiffs' residence was converted into a debris basin and a terrace installed so that drainage from the north portion of defendants' feedlot and the adjacent Folken feedlots to the east would flow around a hill to the south or backside of a hill away from the plaintiffs' residence into the debris basin. A perforated tube was installed in the debris basin to permit the water to drain out of the debris basin in a regular flow and into a drainway which carried it away. These changes provided an additional 382 feet of spacing between the south right-of-way line of the road south of plaintiffs' residence to the closest area of defendants' feedlot. The reconstruction was done under the supervision of the Department of Environmental Control, and when it was completed the livestock waste control facility for the defendants' feedlot and the Folken lots to the east was approved and certified by the department in the summer of 1977.

The evidence also shows that thereafter manure was scraped up and bladed periodically and put into mounds. In the spring of each year mounding was done, using heavy equipment, and a mixture of dirt and manure was scraped and mounded. Mounding was also done in the fall as well. Periodically, the lots were scraped and bladed and manure was pulled up into the mound and smoothed and the lots leveled so they would drain properly.

Prior to the cattle being removed in April of 1980 after the entry of the injunction by the trial court on the mandate of this court in the second case, the lots had been scraped and leveled on five occasions that year. The Folken lots immediately to the east were maintained and operated in the same fashion. Several witnesses who had testified to the strong odors that were present at the time of the first trial testified that after the changes had been made, they no longer noticed

odors coming from the lots when they drove by on the road south of plaintiffs' house.

The defendants called a number of expert witnesses who had examined the defendants' feedlots and the Folken feedlots immediately to the east at a time shortly prior to the trial in this case. Dr. Miner, whose background training and experience was in odor control work related to livestock production, testified that in the area of the former ponds he found no indication of sufficient organic matter to support odor production, even if saturated, and that on the date of his inspection when the debris basin was actually draining water, no odor was perceptible from it until he was within 10 feet of it. It should be noted here that the debris basin is used for the Folken lots to the east as well as for the defendants' lot, and that at the time of trial the Folken lots had approximately 1,000 cattle but had contained as many as 1,200 cattle within a few months prior to trial. Dr. Miner testified that the manure management aspects and the surface water management of the defendants' lot and the adjacent Folken lots were of high quality, designed and managed in such a way as to produce a minimal quantity of odor for a cattle feedlot surface. In his opinion, taking into account the prevailing winds, plaintiffs would be able to detect feedlot odor at a perceptible level at their residence approximately 15 percent of the time.

Dr. Campbell, a research entomologist and an expert in the study and control of feedlot flies, also examined the defendants' and the Folken feedlots. He examined the cattle in the Folken lots and found very few flies on the cattle and no indications of the presence of stable flies. He examined the area of the former holding ponds, the debris basin, the mounds, and the lots for fly breeding areas and found very few. Dr. Campbell testified that, in his opinion, the defendants' feedlot would not tend to create a fly problem for the plaintiffs at their location of a kind and nature greater

or different than experienced by other rural residents.

Dr. Guyer, a livestock specialist who had worked in the area of feedlot production for 26 years, testified that with proper management as being practiced by the defendants fly problems should be no worse for the plaintiffs than it would be around the average farm home.

The various experts generally agreed that at the distance of 382 feet from the south right-of-way of the road to the nearest feedlot of the defendants, they would anticipate that normal traffic on the rural road would cause dust more frequently than the feedlot, and that feedlot dust is seldom a problem in the eastern two-thirds of Nebraska, based upon climatological conditions, and that dust problems, if they occur, would be limited to a dry period in August or September.

Plaintiffs conceded that the structural changes made in 1977 had improved the situation but testified that there were still some flies, odors, and dust. Plaintiffs did not introduce any expert testimony to contradict the testimony of defendants' expert witnesses.

At the conclusion of the trial the District Court found that the odors and the number of flies reflected in the evidence at the first trial would be greatly reduced by the changes which had been made by defendants but that there would be no significant reduction in dust emanating from the feedlot in future operations. The court also found that there will be odors, flies, and dust in any feedyard but that the effect of Nebraska case law is to zone the country and that the location of defendants' feedyard is in an area where smells, dust, and flies are prohibited. The District Court therefore denied defendants' motion and application for a vacation of the injunction.

In essence, the plaintiffs take the position that under the order entered at the direction of this court in the second case, the injunction cannot be vacated or modified until the defendants prove that the feedlot can be operated without odors, flies, and dust. We disagree.

There can be no doubt that the manner in which the defendants were conducting their feedlot operation at the time of the first trial had made plaintiffs' premises virtually uninhabitable and constituted a nuisance.

In the second case plaintiffs' evidence was the bill of exceptions from the first trial, and the court restricted the evidence to the years 1969 to 1974. The evidence therefore indicated that there had been no change in the physical location of the lagoons or of the defendants' feedlot, and no change in the method of operation of the feedlot since the first trial. The defendants did not present any evidence and there was, therefore, no showing that the "nuisance-creating factors" could be dispensed with by any "other means." This court therefore directed the trial court to enter an order enjoining the feeding business. Our opinion was directed at the defendants' feeding operations as shown by the evidence at the first trial and reintroduced at the second trial, and our reference to the situation "as it now exists" in the second case related to the operations shown by that evidence.

The evidence in the third case, which is now before us, establishes that in actuality the situation at the time of the second trial was not the same as it was at the time of the first trial but had been substantially changed. Those changes were not in the record before this court until now.

The evidence in the present case shows that three of the four lagoons which were found to be the principal nuisance-creating factors in the first case have been completely removed, leveled, and the areas planted to pasture. The fourth lagoon was rebuilt into a debris basin with a discharge tube installed. A portion of the north part of defendants' feedlot adjacent to the road south of plaintiffs' residence has been converted from feedlot usage to pasture and the closest area of the defendants' feedlot is now 382 feet south of the south right-of-way line of the road.

The testimony of expert witnesses generally indicates that at its present location and under proper methods of

operation of defendants' feedlot, flies, odor, and dust conditions at plaintiffs' residence will not be substantially different than conditions normally found elsewhere in the area. That expert testimony stands uncontradicted.

A court of equity will not usually enjoin the operation of a lawful business without regard to how serious may be the grievance caused thereby. In the first instance, at least, it will require the cause of the grievance to be corrected and it will enjoin the conduct of the enterprise perpetually after it has been proved that no application of endeavor, science, or skill can effect a remedy or that the owners cannot be induced to conduct it properly. *Botsch v. Leigh Land Co.*, 195 Neb. 509, 239 N.W.2d 481 (1976); *Botsch v. Leigh Land Co.*, 205 Neb. 401, 288 N.W.2d 31 (1980).

The evidence in this case is now convincing that the principal causes of plaintiffs' grievance have been corrected and there is no longer justification for the continuing injunction against the operation of the feedlot enterprise. We therefore direct the District Court to vacate and remove the present injunction.

To maintain the situation now shown in the record, the defendants should be enjoined from placing or maintaining any lagoon, pond, or feedlot closer than 382 feet south of the south right-of-way line of the road south of plaintiffs' residence. The District Court is directed to enter such an order.

The judgment of the District Court is reversed and the cause is remanded with directions.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. RALPH E. THOMAS, APPELLANT.

314 N.W.2d 15

Filed December 28, 1981. No. 44174.

1. **Assault: Words and Phrases.** Serious bodily injury is defined as "bodily injury which involves a substantial risk of death, or which involves substantial risk of serious permanent disfigurement, or protracted loss or impairment of the function of any part or organ of the body." Neb. Rev. Stat. § 28-109(20) (Reissue 1979).
2. **Assault.** A protracted or permanent hearing deficiency caused by an assault constitutes a serious bodily injury under the provisions of Neb. Rev. Stat. §§ 28-109(20) and 28-308 (Reissue 1979).
3. _____. Where persons acting in concert commit an assault, each is responsible for the injuries received by the victim.

Appeal from the District Court for Knox County: MERRITT C. WARREN, Judge. Affirmed.

Leo M. Williams for appellant.

Paul L. Douglas, Attorney General, and John Boehm for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and HASTINGS, JJ.

CLINTON, J.

The appellant, Ralph E. Thomas, was charged with assault in the first degree as delineated in Neb. Rev. Stat. § 28-308 (Reissue 1979). Upon motion by the State, the appellant's case at trial was consolidated with the State's lawsuits against the appellant's two brothers, Gary Thomas and Randy Thomas. Gary and Randy's convictions, assault in the second degree and assault in the third degree, respectively, arose out of the same incident as that which brings the appellant before this court on appeal. In the trial before a jury, the appellant was found guilty as charged and sentenced to 3 to 5 years in the Nebraska Penal and Correctional Complex.

On appeal to this court the appellant assigned and argued the following errors: (1) The evidence presented

was insufficient to sustain a finding of guilt beyond a reasonable doubt; (2) Any finding of guilt as an aider and abettor would be insufficiently supported by the evidence; (3) A conviction for assault in the first degree would be contrary to law as a conviction of the aider for a crime greater than that of the principal; and (4) The sentence was excessive.

The following two paragraphs explain, as revealed by the evidence, the events of August 4, 1980, surrounding the incident leading to Ralph Thomas' conviction. In the afternoon of that day Gary Thomas, the appellant's brother, entered a tavern in Santee, Nebraska, and ordered a case of beer. When the bartender returned from the cooler with Gary's order, he found Gary and Dean Kitto, the Santee chief of police, engaged in a fistfight. In the course of the fight, Kitto sprayed Gary in the face with what appeared to be mace. The altercation ended and Gary, still feeling the effects of the mace, stepped outside. Approximately at the same time, Gary met up with his brothers, Ralph and Randy. It was decided, by whom is unclear, that they would find Thornton Rave, a part-time policeman, and ask that Kitto's gun and mace be taken from him. Other parties irrelevant to this appeal accompanied the Thomas brothers in their search for Thornton Rave.

Meanwhile Rave had driven to the Kitto residence to investigate a report to the effect that the Thomas brothers were breaking the windows from a police car parked at that location. Rave asked a neighbor to the Kitto residence if she knew anything about the broken windows, and as he was walking back to his police car he was confronted and attacked by the Thomas brothers. Ralph first struck Rave in the face with his fist. Then Gary hit Rave in the head with a board about 2 feet long. Rave fell to the ground, and Randy threw himself on Rave belly-flop style. Rave testified that he was also kicked. The altercation lasted about 5 minutes. Rave was taken to a medical clinic in Santee that night for treatment. He testified at trial that as a result of the

beating he suffered a broken eardrum, a slight concussion, bruises, scratches, and a permanent loss of hearing.

Assault in the first degree is defined as follows: "A person commits the offense of assault in the first degree if he intentionally or knowingly causes serious bodily injury to another person." § 28-308(1). The appellant claims in his first assignment that the evidence presented at trial was insufficient to find that serious bodily injury was sustained. Serious bodily injury is defined as "bodily injury which involves a substantial risk of death, or which involves substantial risk of serious permanent disfigurement, or protracted loss or impairment of the function of any part or organ of the body." Neb. Rev. Stat. § 28-109(20) (Reissue 1979). The bulk of the evidence concerning the victim's injuries is the testimony of the victim himself. The victim, Rave, testified he sustained a "busted eardrum," a slight concussion (although he admitted not knowing the meaning of the term *concussion*), a loss of hearing, a temporary loss of memory, and various scrapes and bruises. His testimony was corroborated by the testimony of his wife and photographs showing the scrapes and bruises around his upper body and face. No expert medical testimony was offered.

There is nothing which prohibits the trier of fact from considering the victim's testimony concerning his own injuries to the extent the victim has knowledge of his injuries. Symptoms and effects such as scrapes, bruises, loss of hearing, and memory loss are all within the firsthand knowledge of the victim and were properly presented before the trier of fact. The victim's incompetence to use such terms as *concussion* was exposed on cross-examination. In *Eiting v. Godding*, 191 Neb. 88, 91, 214 N.W.2d 241, 243 (1974), where the only testimony offered concerning the extent of the plaintiff's injuries was the testimony of the plaintiff himself, we said: "In personal injury cases where the injuries are objective and the conclusion to be drawn from proved

basic facts does not require special technical knowledge or science, the use of expert testimony is not legally necessary." In *Yost v. City of Lincoln*, 184 Neb. 263, 265, 166 N.W.2d 595, 597 (1969), we said: "[D]irect expert testimony is not indispensable if the issue can be determined from the evidence presented and the common knowledge and usual experience of the trier of fact." See, also, *Clark v. Village of Hemingford*, 147 Neb. 1044, 26 N.W.2d 15 (1947). The greatest portion of testimony offered by the victim was within a layman's understanding. Therefore, the trier of fact, a jury in this case, could by way of its common knowledge and usual experience find the victim had sustained a serious bodily injury as required under the statute. "This court has adopted the rule in criminal cases that the verdict of a jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. [Citations omitted.] We have also held that in determining the sufficiency of the evidence to sustain a conviction in a criminal prosecution, it is not the province of this court to resolve conflicts in the evidence, pass upon the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence, as such matters are for the jury. [Citation omitted.]" *State v. Pena*, 208 Neb. 250, 253, 302 N.W.2d 735, 737 (1981).

The appellant also claims the blow delivered by a fist is not sufficient to cause the serious bodily injury necessary under the statute. Because the beating of Officer Rave was a group-like brawl committed by the three Thomas brothers, attributing particular injuries to particular actions is very difficult. But as a participant of this conspiratorial effort to harm the officer, the appellant is liable for all of the victim's injuries. *Pinkerton v. United States*, 328 U.S. 640, 66 S. Ct. 1180, 90 L. Ed. 1489 (1946). "[S]o long as the partnership in crime continues, the partners act for each other in carrying it forward. It is settled that 'an overt act of one partner may be the act of all without any new agreement specif-

ically directed to that act.' [Citation omitted.] . . . The act done was in execution of the enterprise. The rule which holds responsible one who counsels, procures, or commands another to commit a crime is founded on the same principle. That principle is recognized in the law of conspiracy when the overt act of one partner in crime is attributable to all." 328 U.S. at 646-47. The *Pinkerton* holding has been criticized, as theoretically it can hold a person liable for all the results of a large crime syndicate while the accused can be virtually uninvolved in much of the criminal activity. But obviously that criticism is inapplicable here. The appellant was directly and physically a part of the altercation. He cannot argue that the injuries to Officer Rave were not a foreseeable result of his actions in concert with his brothers.

There is little doubt that a permanent loss of hearing is a "bodily injury which involves . . . protracted loss or impairment of the function of any part or organ of the body." § 28-109(20). Therefore, the appellant is liable for the hearing loss, a serious bodily injury, and, as such, whether the hearing injury was directly a result of the appellant's fist is irrelevant.

Prior to deliberations, the jury was instructed in part at instruction No. 12 as follows: "To be guilty of the crime charged it is not necessary that the state prove that the defendant himself committed the unlawful act or acts in question.

"Whoever aids, abets, procures, or causes another to commit any offense may be prosecuted and punished as if he were the principal offender."

The appellant, in his second and third assignments of error, claims that the evidence presented was insufficient to find the appellant guilty as an aider and abettor, and notwithstanding that argument, the appellant as an aider and abettor cannot be found guilty for a crime of greater degree than the principal.

Neb. Rev. Stat. § 28-206 (Reissue 1979) reads: "A person who aids, abets, procures, or causes another to com-

mit any offense may be prosecuted and punished as if he were the principal offender." Any person who is present at the place of the crime, aiding and assisting in the commission of the crime, is a principal. *State v. Swiney*, 179 Neb. 230, 137 N.W.2d 808 (1965). Therefore, the appellant is deemed punishable for all injuries resulting from the crime as a principal without the necessity of proving his own particular causation for a particular injury.

The appellant is tried as a principal, and under the statute the common law distinctions between principal and aider and abettor are abolished. *State v. Rice*, 188 Neb. 728, 199 N.W.2d 480 (1972). Therefore, he may be convicted of any crime supported by the evidence of the facts and his intent. As such, the appellant was tried, convicted, and punished as a principal, and his second and third assignments of error alleging defects in an aiding and abetting theory are irrelevant.

Lastly, the appellant complains that the sentence of 3 to 5 years in the Nebraska Penal and Correctional Complex is excessive. The appellant was convicted of a Class III felony, the maximum sentence for which is 20 years. Neb. Rev. Stat. § 28-105 (Reissue 1979). It is a well-established rule that this court on appeal will not disturb a sentence imposed within the limits prescribed by statute absent an abuse of discretion on the part of the trial court. As no such abuse has been shown, the sentence and conviction are affirmed.

AFFIRMED.

WHITE, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. WILLIE LOU SABALA, ALSO KNOWN AS YVONNE SABALA, APPELLANT.

313 N.W.2d 700

Filed December 28, 1981. No. 44295.

1. **Criminal Defendants: Sentences.** Before sentencing a defendant after conviction a trial judge has a broad discretion in the source and type of evidence he may use to assist him in determining the kind and extent of punishment to be imposed within the limits fixed by statute. Highly relevant, if not essential, to his determination of an appropriate sentence is the gaining of knowledge concerning defendant's life, character, and previous conduct.
2. ——: ——. A sentencing judge has broad discretion as to the source and type of evidence or information which may be used as assistance in determining the kind and extent of the punishment to be imposed, and the judge may consider probation officer reports, police reports, affidavits, and other information, including his own personal observations.
3. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal in an absence of an abuse of discretion on the part of the trial court.

Appeal from the District Court for Scotts Bluff County: ALFRED J. KORTUM, Judge. Affirmed.

Raymond, Olsen, Coll & Ediger, P.C., for appellant.

Paul L. Douglas, Attorney General, and Ralph H. Gillan for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

KRIVOSHA, C.J.

The appellant, Willie Lou Sabala, also known as Yvonne Sabala, appeals from a sentence imposed by the District Court for Scotts Bluff County, Nebraska. The sentence, which consisted of imprisonment in the county jail for 1 year and a fine of $250, was imposed by the county court of Scotts Bluff County, Nebraska, and was appealed by Sabala to the District Court. On review, the District Court affirmed the sentence of the county court, but modified it to provide that the sen-

tence of 1 year's imprisonment be served in an institution under the jurisdiction of the Department of Correctional Services pursuant to Neb. Rev. Stat. § 28-106(2)(a) (Reissue 1979), instead of the county jail as previously ordered by the county court.

On appeal to this court, Sabala argues that the sentence of imprisonment of 1 year imposed by the county court and thereafter affirmed by the District Court, except as modified, was excessive and should be reduced by this court. Sabala further argues that the District Court erred in considering an affidavit of one Laura K. Urbano which was made a part of the presentence investigation report. We have examined the record and conclude that the trial court was in all respects correct in its action and that the sentence imposed by the District Court should be affirmed.

Sabala was originally charged with the crime of felony assault, second degree. This is a Class IV felony, punishable by a maximum of 5 years in the penitentiary or a fine of $10,000, or both imprisonment and fine. As a part of the plea bargain, the State reduced the charge to a misdemeanor assault, third degree, a Class I misdemeanor. A Class I misdemeanor is punishable by imprisonment in the county jail of not to exceed 1 year or a fine not to exceed $1,000, or both imprisonment and fine. Under the provisions of § 28-106(2) (a) such a sentence may be served in an institution under the jurisdiction of the Department of Correctional Services.

Sabala appeared in the county court with her attorney and at that time entered a plea of nolo contendere. Evidence was then submitted to the court which was more than sufficient to establish that Sabala had indeed committed the offense for which she was charged, as well as the felony for which she was originally charged. As a result thereof the trial court found Sabala guilty of the misdemeanor charge and ordered a presentence investigation.

We turn first to Sabala's claimed error that the affidavit of Laura Urbano should not have been made a

part of the presentence investigation report and should not have been considered by the trial court. Urbano, a resident of Scottsbluff, Nebraska, and a friend of the individual upon whom Sabala committed the assault, informed the court, through an affidavit earlier given to a police officer in Scottsbluff, about certain drug activities in which the affiant and Sabala were engaged. Sabala and her counsel were given ample opportunity to see the affidavit before sentence was passed and, while they objected to the court considering the affidavit, made no counter showing.

The issue raised by Sabala in this regard is not one of first impression either in this court or the U.S. Supreme Court, and has indeed been addressed by both courts on a number of occasions.

In the case of *Williams v. New York*, 337 U.S. 241, 69 S. Ct. 1079, 93 L. Ed. 1337 (1949), Williams objected to his sentence because information was supplied by witnesses with whom the accused had not been confronted and as to whom he had no opportunity for cross-examination or rebuttal. In rejecting Williams' claim that this violated the due process clause of the fourth amendment, the U.S. Supreme Court said at 250: "We must recognize that most of the information now relied upon by judges to guide them in the intelligent imposition of sentences would be unavailable if information were restricted to that given in open court by witnesses subject to cross-examination. And the modern probation report draws on information concerning every aspect of a defendant's life. The type and extent of this information make totally impractical if not impossible open court testimony with cross-examination. Such a procedure could endlessly delay criminal administration in a retrial of collateral issues."

In *State v. Janis*, 207 Neb. 491, 493, 299 N.W.2d 447, 449 (1980), this court said: "'It is a long accepted practice in this state that before sentencing a defendant after conviction a trial judge has a broad discretion in the source and type of evidence he may use to

assist him in determining the kind and extent of punishment to be imposed within the limits fixed by statute. Highly relevant, if not essential, to his determination of an appropriate sentence is the gaining of knowledge concerning defendant's life, character, and previous conduct.'"

Likewise, in *State v. Kramer*, 203 Neb. 658, 660-61, 279 N.W.2d 634, 636 (1979), we said: "A sentencing judge has broad discretion as to the source and type of evidence or information which may be used as assistance in determining the kind and extent of the punishment to be imposed and the judge may consider probation officer reports, police reports, affidavits, and other information, including his own personal observations." See, also, *State v. Harrington*, 202 Neb. 356, 275 N.W.2d 294 (1979).

Having reviewed the affidavit and concluding that there is nothing contained therein which the trial court could not have considered, particularly in light of the fact that Sabala chose not to rebut any of the statements, we must reject Sabala's assignment of error in that regard.

We turn then to Sabala's claim that the sentence was excessive. In rejecting that claim we need only once again repeat our often-cited rule to the effect that a sentence imposed within statutory limits will not be disturbed on appeal in an absence of an abuse of discretion on the part of the trial court. See, *State v. Tipton*, 206 Neb. 731, 294 N.W.2d 869 (1980); *State v. Harrington, supra; State v. Janis, supra.*

The presentence report in this case discloses that this is not Sabala's first encounter with the law. While Sabala continually maintained her innocence, the police report disclosed the existence of a witness who heard a gunshot and looked outside. He saw the victim on the ground and Sabala standing over him with a handgun in her hand. Sabala never gave any explanation as to how the gun got into her hand. Further, a witness reported to the police he observed Sabala, following the

shooting, with a gun in her hand and overheard her tell some "ladies" that she had just shot Rico, and "the son of a bitch deserved it, and she hoped that he died."

Sabala's police record is extensive, beginning in 1944. She apparently shot a prowler in 1973. In 1975 she was convicted of permitting the use of a building for prostitution. We are unable to find any evidence to support a claim that the trial court abused its discretion. This action merited the maximum sentence if any action ever would. We are therefore left with no alternative but to affirm the sentence.

The judgment and sentence are, in all respects, affirmed.

AFFIRMED.

LORIN E. LINGENFELTER, APPELLANT, V. DORIS V. LINGENFELTER, APPELLEE.

313 N.W.2d 454

Filed December 28, 1981. No. 44543.

Appeal from the District Court for Douglas County: THEODORE L. RICHLING, Judge. Affirmed.

S. Caporale for appellant.

Michael P. Cavel of Stave, Cavel & Coffey, P.C., for appellee.

Submitted without oral argument. KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

PER CURIAM.

This appeal involves a domestic relations matter.

The court, having reviewed the record in this case de novo, agrees with the result reached by the trial court. The judgment is affirmed.

AFFIRMED.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1982

OMAHA PUBLIC POWER DISTRICT,
A PUBLIC CORPORATION, APPELLANT, V.
NEBRASKA STATE TAX COMMISSIONER,
DEPARTMENT OF REVENUE,
STATE OF NEBRASKA, APPELLEE.

314 N.W.2d 246

Filed January 4, 1982. No. 43548.

Statutes. A statute is open to construction only where the language used requires interpretation or may reasonably be considered ambiguous.

Appeal from the District Court for Lancaster County: HERBERT A. RONIN, Judge. Affirmed in part, and in part reversed.

Michael L. Johnson and Stephen G. Olson of Fraser, Stryker, Veach, Vaughn, Meusey, Olson & Boyer, P.C., for appellant.

Paul L. Douglas, Attorney General, and Ralph H. Gillan for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and HASTINGS, JJ.

MCCOWN, J.

This is an action by Omaha Public Power District against the Nebraska State Tax Commissioner and the Department of Revenue seeking judicial review of a sales and use tax deficiency determination in the amount of $13,116.85, plus interest and penalties. The

District Court affirmed the order of the Nebraska State Tax Commissioner determining the deficiency and dismissed plaintiff's petition.

The sales and use taxes involved are for an audit period ending August 31, 1977. Two separate factual situations are involved in the appeal and the facts in both situations are stipulated.

The first situation involves city use tax of the city of Omaha, Nebraska. Stainless steel condenser tubes were purchased by OPPD from Crucible, Inc., outside the State of Nebraska for incorporation into OPPD's power station at Nebraska City. The tubes were delivered to OPPD in Omaha, Nebraska, and stored at its Jones Street station in Omaha for approximately 1 year. The tubes were then transported to Nebraska City where they were installed in the power station. An Omaha city use tax was assessed on the purchase price of the condenser tubes. The Nebraska state use tax has been paid. Only the Omaha city use tax is involved in this appeal.

The second situation involves sales or use taxes in connection with a contract under which Harding-Williams Western Corporation, referred to as Saga, contracted with OPPD to operate a food service on OPPD's premises for OPPD's employees. Under the contract the prices charged by Saga were determined by agreement between Saga and OPPD. Saga retained the money received from the sale of the food. A state and city sales tax was paid by Saga on the sale of food to OPPD employees. In addition, Saga was to receive 4 percent of its gross sales as a management fee to be paid by OPPD. If Saga's operation resulted in a loss after the gross sales proceeds and management fee, OPPD agreed to reimburse Saga for the loss. Any profit in excess of the management fee derived from gross sales was to be paid by Saga to OPPD. Under the contract OPPD paid the management fee to Saga and reimbursed Saga for its losses. There were no profits during the audit period.

The Tax Commissioner assessed a deficiency for state and city use taxes. The District Court found that management fees and loss reimbursement payments by OPPD to Saga constituted part of the gross receipts of Saga and that such payments were subject to sales tax, and affirmed the order of the Tax Commissioner.

Neb. Rev. Stat. § 77-27,142 (Supp. 1981) provides in part: "Any incorporated municipality by ordinance of its governing body is hereby authorized to impose a sales and use tax of one half or one per cent upon the same transactions within such incorporated municipality on which the State of Nebraska is authorized to impose a tax pursuant to the provisions of the Nebraska Revenue Act of 1967, as amended from time to time."

The city of Omaha adopted a sales and use tax under that authorization "upon the same transactions within the corporate limits of the city on which the state is authorized to impose a tax pursuant to the provisions of the Nebraska Revenue Act of 1967, as amended from time to time." Omaha Municipal Code § 35-21.

With respect to the city use tax on the condenser tubes, Neb. Rev. Stat. § 77-2703(2) (Supp. 1981) provides: "A use tax is hereby imposed on the storage, use, or other consumption in this state of tangible personal property purchased, leased, or rented from any retailer on or after June 1, 1967, for storage, use, or other consumption in this state at the rate set as provided in subsection (1) of this section on the sales price of the property or, in the case of leases or rentals, of said lease or rental prices."

Neb. Rev. Stat. § 77-2702(17) (Supp. 1981) provides: "Storage shall include any retention in this state for any purposes except sale in the regular course of business or subsequent use solely outside this state of tangible personal property purchased from a retailer, other than tangible personal property which will enter into or become an ingredient or component part of tangible personal property manufactured, processed, or fabricated for ultimate sale at retail. Neither storage

nor use as defined in this subdivision shall include the keeping, retaining, or exercising of any right or power over tangible personal property for the purpose of subsequently transporting it outside the state, or for the purpose of being processed, fabricated, or manufactured into, attached to, or incorporated into, other tangible personal property to be transported outside the state and thereafter used solely outside the state."

OPPD contends that the city use tax may not validly be imposed at the point where the property is first stored in the state but only at the point of its ultimate destination, and argues that a city may not impose a use tax on property stored in the city but intended for ultimate use in another Nebraska location. To reach that result would require this court to find that the specific language of the statute was ambiguous and to rewrite the statute to meet an assumed legislative intent. We decline to do so. The practical difficulties of deferring city use taxes until the ultimate destination of the property within Nebraska has been determined are obvious. There is no threat of double taxation because the use tax is payable only once. See Neb. Rev. Stat. § 77-2708(2)(a) (Supp. 1981).

A statute is open to construction only where the language used requires interpretation or may reasonably be considered ambiguous. *State ex rel. Halloran v. Hawes*, 203 Neb. 405, 279 N.W.2d 96 (1979). The language of §§ 77-2703(2) and 77-2702(17) is specific and unambiguous and requires no interpretation. The factual situation involving the storage in Omaha and the subsequent use of the condenser tubes in Nebraska City was subject to the use tax of the city of Omaha as well as to the Nebraska state use tax.

We turn now to the issue of sales or use taxes in connection with the food service contract between OPPD and Saga. The Tax Commissioner held that the management fee and the loss reimbursement payments by OPPD to Saga were taxable as part of the gross receipts for food sales and assessed a use tax deficiency

against OPPD. The District Court determined that the management fee and loss reimbursements constituted part of the gross receipts of Saga and that such payments were subject to sales tax, and affirmed the order of the Commissioner.

The tax involved is a sales tax rather than a use tax. Statutory definitions are determinative. Section 77-2702(13) provides in part: "Sale shall mean and include any transfer of title or possession or segregation in contemplation of transfer of title or possession, exchange, barter, lease, or rental, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration. Sale shall include:

. . . .

"(c) The furnishing, preparing, or serving for a consideration of food, meals, or drinks."

Section 77-2702(20) provides in part: "Use shall mean the exercise of any right or power over tangible personal property incident to the ownership or possession of that tangible personal property, except that it does not include the sale of that tangible personal property in the regular course of business or the exercise of any right or power over tangible personal property which will enter into or become an ingredient or component part of tangible personal property manufactured, processed, or fabricated for ultimate sale at retail."

Nebraska imposes a tax upon the gross receipts from all sales of tangible personal property sold at retail in the state. See § 77-2703(1).

Section 77-2702(4)(a) provides in part: "Gross receipts shall mean the total amount of the sale or lease or rental price, as the case may be, of the retail sales of the retailers, valued in money, whether received in money or otherwise, without any deduction on account of any of the following:

"(i) The cost of tangible personal property sold. . . .

"(ii) The cost of the materials used, labor or service costs, interest paid, losses, or any other expense;

"(iii) The cost of transportation of the tangible personal property prior to its sale to the purchaser; or

"(iv) The amount of any excise or property tax levied against the tangible personal property, except as otherwise provided in sections 77-2701 to 77-27,135."

It is stipulated that state and city sales taxes were paid by Saga on the gross receipts by Saga from the sale of food to OPPD employees. No use taxes were paid by anyone.

Some courts have held that payments by an employer to a food service provider for food service to employees on the employer's premises may be taxable in certain situations. Where the price of meals was discounted to employees by a specified percentage and the employer paid the remaining percentage of the price of the meal, or where the employer paid an independent contractor the entire cost of meals furnished to employees without charge, courts have held that such payments are subject to sales tax. See, *Davis v. Chilivis*, 142 Ga. App. 679, 237 S.E.2d 2 (1977); *First Nat. Bank of Fort Worth v. Bullock*, 584 S.W.2d 548 (Tex. Civ. App. 1979).

In factual and contractual circumstances similar to those involved in the instant case, however, courts have held that payments such as those involved in the case now before us are not taxable. In *Szabo Food Service, Inc. v. State Bd. of Equalization*, 46 Cal. App. 3d 268, 119 Cal. Rptr. 911 (1975), the contracts between the employers and the food service provider were almost identical to the contract involved here. The food service was operated on the employers' premises and the food service provider paid sales tax only on the amounts received from employees on the sales. Under the contract the food service provider was to recover its expenses as well as a management fee based on a percentage of the employee sales or on a fixed fee. The California court held that the amounts paid to the food service provider by the employers were

not subject to sales tax. The court emphasized that gross receipts constituted the amounts received in consideration for the sale of tangible personal property and that only the employees' payments for the meals constituted the consideration for the sale of the meals. The subsidies paid by the employers merely guaranteed a profit to the food service operation and such subsidies could not be traced to particular sales of particular meals, nor were they a part of any scheme to avoid sales taxes.

The Supreme Court of Illinois has reached the same result in the case of *Chet's Vending Service v. Dept. of Revenue*, 71 Ill. 2d 38, 374 N.E.2d 468 (1978). In that case a caterer provided food to employees at several industrial locations under separate individual contracts. In addition to money received from food sales to employees, the caterer also received either a fixed fee from the employer or a loss reimbursement payment. The Illinois court held that the sales tax did not apply to the management fee or the subsidies and also emphasized that the payments by the employer could not be traced to any specific sale. The Illinois court determined that the evidence showed no basis for relating any portion of the fixed fee or guaranty payment to any individual sale as part of the selling price. To construe the terms "selling price" and "gross receipts" in the manner contended for by the Department of Revenue would require the court to hold that the sales at each industrial location during a calendar month constituted one sale to both the employer and the employees, the "selling price" of which was the aggregate of the sums received from the employees and the monthly payment received from the employer.

The rationale of the California and Illinois cases is logical and reasonable and we apply it here. The management fee and subsidies involved in the case now before us are paid for services rendered and not for the sale of tangible personal property. We hold that such payments are not subject to either state or city

sales or use taxes.

The judgment of the District Court with respect to imposition of the Omaha city use tax upon the storage in Omaha of stainless steel condenser tubes is affirmed. The judgment of the District Court imposing state and city sales taxes upon the management fee and subsidy payments made by OPPD to Saga is reversed.

AFFIRMED IN PART, AND IN PART REVERSED.

WHITE, J., participating on briefs.

MARVIN V. MILLER, PERSONAL REPRESENTATIVE OF THE ESTATE OF FRANK J. JANECEK, DECEASED, APPELLANT, V. ROBERT JANECEK, APPELLEE.

314 N.W.2d 250

Filed January 4, 1982. No. 43553.

Decedents' Estates: Joint Accounts. Sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties. Such transfers are by reason of the account contracts involved and Neb. Rev. Stat. § 30-2706 (Reissue 1979), and are not testamentary in nature.

Appeal from the District Court for Saunders County: BRYCE BARTU, Judge. Reversed and remanded with directions.

Marvin V. Miller, pro se.

No appearance for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and HASTINGS, JJ.

PER CURIAM.

This is an appeal from a civil action brought by the personal representative of the estate of Frank J. Janecek, deceased, to recover a money judgment against the defendant, Robert Janecek, for conversion

and for an accounting of funds allegedly held in constructive trust. Plaintiff appeals from an order sustaining defendant's motion for summary judgment.

The petition alleges that the decedent, on December 27, 1973, went to the First National Bank in Wahoo, Nebraska, to change his checking and savings accounts from sole accounts to joint accounts with right of survivorship with his son Robert. Signature cards were executed authorizing Robert to make deposits and withdrawals on the accounts. Thereafter, in January 1974, the decedent entered a care home and Robert managed the business affairs of the decedent. Robert endorsed checks of the decedent, depositing them into one or the other of the two joint accounts, and signed all the checks from the joint accounts. Robert continued managing his father's affairs until his father's death on January 3, 1978.

The plaintiff further alleged that during the last 2 years of decedent's life, he became extremely ill. No guardianship, conservatorship, or powers of attorney were ever granted to Robert or to any other person.

During his life, the decedent was possessed of real estate, tangible personal property, and the joint checking and savings accounts. Shortly before the decedent's death, Robert sold grain belonging to the decedent and deposited the proceeds into one of the joint accounts.

After the decedent's death, the personal representative made demand on Robert to pay over the funds in the joint checking and savings accounts. Robert refused on the grounds that the funds were not part of the decedent's estate and passed to Robert by virtue of the right-of-survivorship clause. The personal representative listed the balances of the joint accounts in the estate inventory. The personal representative filed a petition for direction from the county court, and an order was entered authorizing the personal representative to maintain an action in the District Court to determine ownership of the joint accounts.

Robert, the appellee herein, filed a motion for summary judgment, alleging that the District Court had no subject matter jurisdiction, which motion was sustained by the District Court. The District Court, in its order granting summary judgment to the appellee, stated: "The subject matter of this action is a matter relating to the estate of a decedent and by virtue thereof is subject matter jurisdiction for the County Court of Saunders County, Nebraska under Section 30-2211 R.R.S. 1943." The personal representative perfected his appeal to this court. We reverse.

The District Court based its decision on Neb. Rev. Stat. § 30-2211 (Reissue 1979), which provides: "(a) To the full extent permitted by the Constitution of Nebraska, the [county] court has jurisdiction over all subject matter relating to (1) estates of decedents, including construction of wills and determination of heirs and successors of decedents, and estates of protected persons . . . ."

The District Court derives its broad jurisdiction and powers from Neb. Const. art. V, § 9, which provides in part: "The district courts shall have both chancery and common law jurisdiction, and such other jurisdiction as the Legislature may provide . . . ."

Neb. Rev. Stat. § 24-302 (Reissue 1979) provides: "The district courts shall have and exercise general, original and appellate jurisdiction in all matters, both civil and criminal, except where otherwise provided."

The county court's jurisdiction is set forth in Neb. Rev. Stat. § 24-517 (Reissue 1979), which provides in part: "Each county court shall have the following jurisdiction:

"(1) Exclusive original jurisdiction of all matters relating to decedents' estates, including the probate of wills and the construction thereof;

. . . .

"(4) Concurrent original jurisdiction with the district court in all civil actions of any type when the amount in controversy does not exceed five thousand dollars;

. . . .

"(9) All other jurisdiction heretofore provided and not specifically repealed by Laws 1972, Legislative Bill 1032, and such other jurisdiction as hereafter provided by law."

The county courts can only acquire jurisdiction through legislative enactment. Neb. Const. art. V, § 1; *In re Estate of Layton*, 207 Neb. 646, 300 N.W.2d 802 (1981). The Nebraska Legislature enacted the Nebraska Probate Code in 1974 Neb. Laws, L.B. 354. Section 30-2211, the section on which the district judge granted summary judgment, was enacted as part of the Nebraska Probate Code and corresponds to § 24-517.

Against this backdrop of constitutional and statutory provisions, the issue in this case is which court had jurisdiction to determine title to the joint accounts and to make a determination of whether or not the funds in the accounts had been converted.

The appellee contends that the action cannot be brought in the District Court since it is an action "relating to decedents' estates," and must be brought in the county court. The appellant, on the other hand, contends that the District Court has jurisdiction to determine title to property, regardless of the fact that the personal representative brought the action or that, if he is successful, the property may be recovered by and distributed through the estate. Furthermore, the fact that a personal representative is involved in a lawsuit does not automatically make the matter one relating to a decedent's estate.

Neb. Rev. Stat. § 30-2704(a) (Reissue 1979) states in part: "Sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties as against the estate of the decedent unless there is clear and convincing evidence of a different intention at the time the account is created."

Neb. Rev. Stat. § 30-2706 (Reissue 1979) provides further: "Any transfers resulting from the application of section 30-2704 are effective by reason of the account

contracts involved and this statute and are not to be considered as testamentary or subject to Articles 22 to 25 of this code."

The District Court erred in finding that the county court acquired jurisdiction over this action by virtue of § 30-2211 since the property was transferred by contract and is not testamentary in nature.

We note that the personal representative's authority to bring this action in the District Court may be inferred from Neb. Rev. Stat. § 30-2476 (Reissue 1979), which provides in part: "[A] personal representative, acting reasonably for the benefit of the interested persons, may properly: . . . (22) prosecute or defend claims or proceedings in *any jurisdiction* for the protection of the estate and of the personal representative in the performance of his duties . . . ." (Emphasis supplied.)

Further, since this is an equity action based on constructive trust or, in the alternative, conversion, it must be brought in the District Court. County courts have no equity jurisdiction over this type of action. We have said in the past that a county court, in exercising its original jurisdiction over estates, could apply equitable principles to matters within its probate jurisdiction. *In re Estate of Layton, supra.* This is not the case here.

In *State ex rel. Wright v. Barney*, 133 Neb. 676, 680-81, 276 N.W. 676, 680-81 (1937), we said: "'This court is committed to the view that not only is equity jurisdiction conferred by the terms of the Constitution, but that, as thus conferred, it is beyond the power of the legislature to limit or control; that while the legislature may grant to the district courts such other jurisdiction as it may deem proper, it cannot limit or take from such courts their broad and general jurisdiction which the Constitution has conferred upon them. . . .' [Citations omitted.]

"It is obvious that the exclusive and preeminent nature of the equity jurisdiction conferred on the

district courts by these constitutional provisions is equally true of the common-law jurisdiction likewise vested in the same tribunals.

"And, we are also committed to the view: 'It is an imperative duty of the judicial department of government to protect its jurisdiction at the boundaries of power fixed by the Constitution.'"

This case can be distinguished from *In re Estate of Kentopp*, 206 Neb. 776, 295 N.W.2d 275 (1980), and *In re Estate of Layton*, 207 Neb. 646, 300 N.W.2d 802 (1981), in that in those cases the property involved was clearly the decedent's at the time of his death and subject to administration in the county court.

The judgment of the District Court is hereby reversed and remanded for proceedings not inconsistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

WHITE, J., participating on briefs.

MARY RHEIN, PERSONAL REPRESENTATIVE OF THE ESTATE OF WILLIAM P. RHEIN, DECEASED, AND BARTON FORD, DOING BUSINESS AS FORD FARMS, APPELLANTS, V. CATERPILLAR TRACTOR CO., A FOREIGN CORPORATION, ET AL., APPELLEES.

314 N.W.2d 19

Filed January 4, 1982. No. 43678.

1. **Abatement, Survival, and Revivor: Decedents' Estates.** Under most survival statutes, which merely preserve and continue the right of action which the deceased had prior to his death without creating any new cause of action, no action can be maintained where the wrongful act resulted in instantaneous death, since in such case no cause of action in deceased ever came into being, and there is none that can survive.
2. **Joinder of Actions: Decedents' Estates.** An action for damages incurred by the decedent up to the date of his death and an action for damages suffered by his widow or widower and next of kin after his death may be joined in a single action.

3. **Abatement, Survival, and Revivor: Decedents' Estates: Damages.** In a revived action the personal representative may recover damages for pain and suffering endured by the deceased; for the expenses incurred, necessitated by the injuries, in the nature of medical and hospital expenses and the like; and he may recover for the loss of earnings which are sustained by the injured party during his lifetime as a result of the injuries. But in the action brought by the personal representative, in behalf of the statutory beneficiaries, to recover damages for the death caused by the wrongful act of the defendant, the recovery must be measured by the pecuniary loss suffered by those beneficiaries by being deprived of what they would have received from the earnings of the injured party from the date of his death had he lived out his full expectancy.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed.

R. Steven Geshell of Robak & Geshell for appellants.

John A. Rickerson of Rickerson & Welch for appellee Missouri Valley.

Ronald F. Krause of Cassem, Tierney, Adams, Gotch & Douglas for appellees Hartford Sand and Gravel and Rogert.

William J. Brennan, Jr., and George Penry of Fitzgerald, Brown, Leahy, Strom, Schorr & Barmettler for appellee Caterpillar.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

KRIVOSHA, C.J.

The appellant Mary Rhein (Rhein), as personal representative of estate of William P. Rhein, deceased (decedent), appeals from an order entered by the District Court for Douglas County, Nebraska, sustaining a motion for summary judgment filed by the appellees, Caterpillar Tractor Co. (Caterpillar), Missouri Valley Machinery Co. (Missouri Valley), Hartford Sand and Gravel Co. (Hartford Sand), and Donald N. Rogert (Rogert). In sustaining the motion for summary judgment the trial court dismissed the plaintiffs' petition.

We believe that the trial court was correct in sustaining the motion for summary judgment and dismissing the action, and therefore we affirm the judgment of the trial court.

Decedent was employed by Ford Farms of Valley, Nebraska. On October 17, 1975, he was operating a D-8 bulldozer on a site-clearing project where he was attempting to spread two tree trunks with the bulldozer. While doing so, one of the branches of a tree fell on him, crushing him to death in the seat of the bulldozer. The bulldozer had been either manufactured or sold by the various defendants.

For reasons which do not appear in the record, no wrongful death action was commenced by the personal representative of the decedent on behalf of his widow or next of kin, pursuant to the provisions of Neb. Rev. Stat. § 30-809 (Reissue 1979), which provides in part: "Whenever the death of a person shall be caused by the wrongful act, neglect or default, of any person, company or corporation, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured . . . ." A wrongful death action, under the provisions of § 30-809, must be brought within 2 years of the date of the decedent's death or is thereafter barred. Neb. Rev. Stat. § 30-810 (Reissue 1979).

Instead of bringing the wrongful death action within 2 years of death, decedent's personal representative filed suit against the various defendants in this case in the District Court for Douglas County, Nebraska, on September 26, 1979, more than 2 years but less than 4 years after decedent's death. By its amended petition, Rhein claimed that by reason of various acts of alleged negligence committed by some or all of the defendants,

the bulldozer upon which the decedent was riding at the time he was killed was defectively designed and manufactured, and as a result thereof the decedent was killed. The action sought to recover damages which the decedent would have been entitled to recover had he lived, as opposed to damages which the beneficiaries might seek to recover under the wrongful death act.

The parties each acknowledge that there is but a single question involved in this case. As stated by Rhein, the question is whether the decedent has a cause of action separate from the personal representative's cause of action under the Lord Campbell Act for the decedent's loss of future earning capacity and enjoyment of life which survives his death and is recoverable by his personal representative on behalf of decedent's estate even though the wrongful death cause of action is barred by the 2-year statute of limitations. The trial court answered that question in the negative and dismissed the action. As we have already indicated, we agree with the trial court.

Both at common law and in this jurisdiction prior to 1867, a cause of action for injuries to the person did not survive on the death of either the person injured or the wrongdoer, and a pending action for such an injury abated on the death of either the plaintiff or the defendant. See, 1 C.J.S. *Abatement and Revival* § 144 (1936); *Wilson v. Bumstead*, 12 Neb. 1, 10 N.W. 411 (1881); *Warren v. Englehart*, 13 Neb. 283, 13 N.W. 401 (1882); *Swift v. Sarpy County*, 102 Neb. 378, 167 N.W. 458 (1918); *Gengo v. Mardis*, 103 Neb. 164, 170 N.W. 841 (1919); *Hindmarsh v. Sulpho Saline Bath Co.*, 108 Neb. 168, 187 N.W. 806 (1922); *Egbert v. Wenzl*, 199 Neb. 573, 260 N.W.2d 480 (1977).

It was only by reason of the enactment of the survivorship statutes, Neb. Rev. Stat. §§ 25-1401 and 25-1402 (Reissue 1979), in 1867 and the adoption of a form of the Lord Campbell Act in 1873 that the common-law rule was, in any manner, changed, and then only to the limited extent provided by statute.

As we noted in *Gengo v. Mardis*, *supra* at 170, 170 N.W. at 843: "Before the passage of the Lord Campbell Act, there was no provision for damages growing out of injury by death, and this act [Lord Campbell Act] meets that situation."

The Lord Campbell Act did create a new cause of action. The difference, however, is that the cause of action created by the Lord Campbell Act was not for the decedent but, rather, for the exclusive benefit of the widow or widower and next of kin of the decedent. See § 30-810. The plain language of the Lord Campbell Act does not entitle the personal representative to bring suit for damages arising after the date of the death of the decedent on behalf of anyone other than the widow, widower, or next of kin. See *United Materials, Inc. v. Landreth*, 196 Neb. 525, 244 N.W.2d 164 (1976).

The survival statute, on the other hand, does not create a new cause of action but merely preserves whatever cause of action was in existence on the date upon which the decedent died. Section 25-1401 provides: "In addition to the causes of action which survive at common law, causes of action for mesne profits, or for an injury to real or personal estate, or for any deceit or fraud, shall also survive, and the action may be brought, notwithstanding the death of the person entitled or liable to the same." And § 25-1402 provides: "No action pending in any court shall abate by the death of either or both the parties thereto, except an action for libel, slander, malicious prosecution, assault, or assault and battery, or for a nuisance, which shall abate by the death of the defendant."

Unless the cause of action existed *before* death occurs, it does not survive *after* death. The cause of action does not come into existence by reason of the survival statute but only survives the injured party's death.

As noted in 25A C.J.S. *Death* § 22 (1966): "Under most survival statutes, which merely preserve and continue the right of action which the deceased had prior to his death, without creating any new cause of action, no

action can be maintained where the wrongful act resulted in instantaneous death, since in such case no cause of action in deceased ever came into being, and there is none that can survive." In this case, while Rhein is unwilling to concede that the decedent died instantaneously, a reading of the pleading makes it clear that Rhein's cause of action was based upon a theory of instantaneous death. There is no allegation made with regard to any hiatus between the time when the tree branch fell on the decedent and when he was killed. Rather, the amended petition alleges that the tree branch fell upon the decedent, killing him while he was sitting in the tractor. The decedent suffered no recoverable damages until the branch fell on him, causing his death. Any damages which occurred after his death can only be recovered by his widow or next of kin under the Lord Campbell Act.

Appellant argues to this court that holding that decedent has a separate cause of action will not require us to declare any new rule of law contrary to the long-established common-law rule. In support of that position, appellant argues that, in effect, the cases of *Hindmarsh v. Sulpho Saline Bath Co.*, 108 Neb. 168, 187 N.W. 806 (1922), and *Murray v. Omaha Transfer Co.*, 95 Neb. 175, 145 N.W. 360 (1914), further reported in 98 Neb. 482, 153 N.W. 488 (1915), already recognized that a cause of action exists in the decedent for losses occurring after his death. While one may be able to extract a line here and there from those opinions relied upon by Rhein to make such argument, when one reads the opinions in their entirety it is clear that the position taken by Rhein in this case is unsupported by those cases.

The situation in *Murray* involved an individual who was struck on August 27, 1910, by a horse and wagon. He did not die until 2 days later. Prior to his death, suit was filed for his injuries sustained during his lifetime. After his death the action was revived in the name of his administrator, and an amended petition was filed

demanding damages for Murray's injuries *for the benefit of his heirs under the Lord Campbell Act. Murray* simply held that the action belonging to the decedent prior to his death did not abate by his death but, rather, survived, and that *a second* cause of action arose upon his death for the benefit of his widow or widower and next of kin. *Murray* stands for the proposition that an action for damages incurred by the decedent up to the date of his death and an action for damages suffered by his widow or widower and next of kin after his death may be joined in a single action. The fact that the court in *Murray* permitted the jury to consider loss of Murray's earnings for the balance of his life expectancy does not support Rhein's position in this case. The jury was permitted to consider the life expectancy tables and future loss of earnings in connection with the wrongful death action brought on behalf of the widow and next of kin and not in connection with the negligence action brought on behalf of the decedent for damages incurred prior to his death.

In *Hindmarsh* the decedent was injured when, while in a delirious condition, he escaped and leaped from a window of a hospital. An action, other than the one presented for review in *Hindmarsh*, was begun by him in his lifetime to recover damages. The action for his own damages was pursued to completion, even though he had died. The first action was tried upon the theory that the death of the decedent was caused by the wrongful act of the defendant and that the plaintiff was entitled to recover in the one action all the damages which the deceased could have recovered had he been totally and permanently disabled, and had he survived and lived out his entire expectancy.

The second action, which was presented for review in *Hindmarsh*, was then filed under the Lord Campbell Act. The second action was dismissed on the basis that the two causes of action had really been reduced to judgment in the first case. This court said in *Hindmarsh*, *supra* at 171-72, 187 N.W. at 808: "The former action,

instituted by the deceased in his lifetime, was based upon the common-law right of recovery. It would have abated except for our statute (Rev. St. 1913, sec. 8023), providing that no action pending in any court shall abate by the death of either or both of the parties. *Webster v. City of Hastings*, 59 Neb. 563; *Sheibley v. Nelson*, 83 Neb. 501; *Levin v. Muser*, 107 Neb. 230.

"Had the former action finally terminated in a judgment prior to the death of Roy B. Hindmarsh, it seems clear that such judgment would have been a complete bar now, for, in order to recover in this action, under the statute (Rev. St. 1913, sec. 1428), it is necessary to show not only that the death resulted from a wrongful act, and that there are statutory beneficiaries for whom suit can be brought, but that, had the deceased lived, he himself would have been entitled to maintain an action. Had his cause of action been settled by him, or been reduced to judgment prior to his death, that would have eliminated one of the essential conditions to a recovery in this action, for his cause of action would have been extinguished and he would thereafter, had he lived, have had no right to sue. 17 C.J. 1250, sec. 102. Such a rule does not deny a full recovery. Had he prosecuted his suit and obtained a judgment prior to his death, he would have been entitled to an award of damages sufficient to cover all loss of every kind sustained. He could have recovered not only for pain and suffering and for expenses incurred, but also for loss of earnings, based upon his entire expectancy of life, as shown by his condition of health and age prior to the time of the injury. Though, by the injury, his life was to be shortened, or his death caused, still that would not have deprived him of the right to the maximum recovery, based on his full expectancy of life, as stated."

In *Hindmarsh*, *supra* at 173-75, 187 N.W. at 808-09, we went on to say: "A single wrongful act, it is true, may cause an injury to more than one person, and every person sustaining injury through it is entitled to recover his loss. The quantum of loss actually sustained by all

persons concerned, in a case of this kind, has a definite limit. The limit of that loss is the damage caused to the injured party by his pain and suffering; the loss through expenditure for medical and hospital services and other such expenses; and the loss of all earnings that he would otherwise have been able to make, had he not been injured, based upon an expectancy of life, as shown by his age and condition of health prior to his injuries.

" . . . The object of such statutes, both of the revival statute and of the statute giving a recovery for death caused by wrongful act, was to give and preserve *to the parties damaged* a complete remedy and opportunity to recover the loss sustained, a loss which, at the common law, they could not have recovered owing to the fact that the death of the party who had sustained the injuries extinguished the cause of action. [Emphasis supplied.]

. . . .

"Where the remedies are held to be concurrent, and we take it they are concurrent in this state, the recovery in the revived action must be limited to such as the deceased might have recovered, had he lived, *but not extending beyond the time of his death.* [Emphasis supplied.] This is manifest from the expressed intention of the legislature that the recovery for the statutory beneficiaries for the pecuniory [sic] loss, growing out of the death, shall be for the beneficiaries *exclusively.* . . . [Emphasis in original.]

"In the revived action the personal representative may recover damages for pain and suffering endured by the deceased; for the expenses incurred, necessitated by the injuries, in the nature of medical and hospital expenses, and the like; and he may recover the loss of earnings, which are sustained by the injured party, *during his lifetime as a result of the injuries.* But in the action brought by the personal representative, in behalf of the statutory beneficiaries, to recover damages for the death caused by the wrongful act of the defendant, the recovery must be measured by the pecuniary loss suffered by those beneficiaries by being

deprived of what they would have received from the earnings of the injured party from the date of his death, had he lived out his full expectancy. Under this construction, a double recovery is avoided, although the double remedy is recognized. [Emphasis supplied.]

"These two actions may be pursued separately in different suits, each being confined to its own specific limit of recovery, or they may be joined in one action and separate verdicts returned."

As a result of the court's conclusion in *Hindmarsh*, the heirs were not permitted to maintain a wrongful death action, Hindmarsh having recovered all the damages for both actions in the first suit. We believe the reasoning expressed in *Hindmarsh* is correct. Little purpose would be served by adopting a Lord Campbell-type statute in this state if the decedent's estate already had a cause of action for the losses sustained by the decedent in the future by reason of his death. We do not believe that is what the Legislature intended when adopting the Lord Campbell Act.

In the instant case, the decedent suffered no recoverable damages prior to his death and therefore no cause of action survived. The wrongful death action had to have been brought within 2 years after the death of such person or it was barred. Since no action was brought within that time, it is barred. See § 30-810. That being the case, no cause of action not otherwise barred by the passage of time exists in anyone. The trial court was correct in sustaining the motion for summary judgment and dismissing the petition. The judgment is affirmed.

AFFIRMED.

UNION PACKING COMPANY OF OMAHA, INC., AND FIREMAN'S FUND INSURANCE COMPANY, APPELLEES, V. HENRY F. KLAUSCHIE, APPELLEE, ARGONAUT INSURANCE COMPANY, APPELLANT.

314 N.W.2d 25

Filed Janaury 4, 1982. No. 44060.

1. **Workmen's Compensation: Appeal and Error.** Findings of fact made by the Workmen's Compensation Court on rehearing have the same force and effect as a jury verdict in a civil case and, if supported by sufficient evidence, will not be disturbed on appeal unless clearly wrong.
2. **Workmen's Compensation: Words and Phrases.** In workmen's compensation cases the term "arising out of" describes the accident and its origin, cause, and character, i.e., whether it resulted from the risks arising within the scope or sphere of the employee's job. The term "in the course of" refers to the time, place, and circumstances surrounding the accident. The two phrases are conjunctive and the claimant must establish by a preponderance of the evidence that both conditions exist.
3. **Workmen's Compensation.** The primary purpose of the Workmen's Compensation Act is to insure an employee against accidential injury arising out of and in the course of his employment. To accomplish this purpose the act should be liberally construed, not to find that liability exists without the required quantum of proof, but to include within the protection of the act by liberal interpretation all injuries arising out of and in the course of the employment which the act does not clearly exclude. A strict interpretation should not be resorted to in order to accomplish such exclusion.
4. **Workmen's Compensation: Evidence: Appeal and Error.** Where a record presents nothing more than conflicting medical testimony, we will not substitute our judgment for that of the Workmen's Compensation Court.
5. **Workmen's Compensation: Words and Phrases.** An accident is defined as an unexpected or unforeseen injury happening suddenly and violently and producing at the time objective symptoms of an injury.
6. ____: ____. The terms "injury" and "personal injuries" shall mean only violence to the physical structure of the body and such disease or infection as naturally results therefrom.

Appeal from the Nebraska Workmen's Compensation Court. Affirmed in part, and in part reversed and remanded with directions.

Joe P. Cashen and Jon S. Reid of Kennedy, Holland,

DeLacy & Svoboda for appellant.

Patrick B. Donahue of Cassem, Tierney, Adams, Gotch & Douglas for appellee Klauschie.

Ronald E. Frank of Sodoro, Daly & Sodoro for appellees Union Packing and Fireman's Fund.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

HASTINGS, J.

Union Packing Company of Omaha, Inc., and Fireman's Fund Insurance Company filed their petition in the Nebraska Workmen's Compensation Court seeking a determination as to whether Fireman's Fund or the Argonaut Insurance Company was liable for benefits under the Workmen's Compensation Act arising from an injury and subsequent disability suffered by an employee of Union Packing, Henry F. Klauschie. Argonaut contended that any injury sustained by the employee was not a compensable injury, and in any event the injury occurred prior to the effective dates of Argonaut's coverage, and therefore Argonaut was not liable. The court resolved both issues against Argonaut, and it has appealed to this court. We reverse.

Argonaut became the workmen's compensation insurer for Union Packing at 12:01 a.m. on April 15, 1979, following the expiration of the coverage provided by Fireman's Fund.

Henry Klauschie had been employed by Union Packing for about 11 years, approximately 10 of which years were spent trimming meat on the kill floor of the plant. Health and safety considerations required that he wear rubber boots while working, and he customarily wore two pairs of socks under the boots for comfort. Because of the nature of his duties, he would spend most of the day working on his toes and the balls of his feet.

Somewhere around the middle of March 1979, Mr. Klauschie noticed a break or blister on the ball of

his right foot. In his own words, it was "a little crack or a little . . . break. . . . It is white and had a little bump on it." He did not see a doctor immediately, but instead soaked the foot in Epsom salts every evening in an attempt to cause the sore to heal. There was no swelling associated with the sore in the early stages, and Mr. Klauschie testified that there was never really any pain.

Approximately 2 to 3 weeks prior to July 16, 1979, the foot began to swell and the sore commenced to darken. Four or five days before July 16, 1979, Mr. Klauschie's son urged him to see a physician, and on July 16th he first consulted with Dr. Charles F. Brannen. Dr. Brannen found a very severely infected foot, ulcerated at the bottom and extending up to the base of the toe, with marked swelling and cellulitis of the foot extending up to the mid-foreleg. He immediately arranged for the admission of Mr. Klauschie to the hospital. Further examination disclosed that the foot was infected with Staphylococcus epidermitis and Proteus mirabilis, which eventually developed into osteomyelitis, an infection of the bone. The failure of less radical means of treatment required the amputation of the great toe, second toe, first metatarsal, and one-half of the second metatarsal, and the cartilage of the cuneiform from the right foot.

According to the testimony of Dr. Brannen, the history given to him by Mr. Klauschie revealed that the blister had been discovered some 3 weeks prior to July 16th. In the doctor's opinion, the infection developed at the site of the blister and, due to its virulent nature, could not have begun as early as June 16th. It was his opinion that the infection began "within a week from the time . . . that the family began to worry about it," and at the earliest, after July 1, 1979.

Dr. Brannen testified further that, although he believed that the infection entered the system at the site of the blister, it was the continuous wearing of the rubber boots that created the proper

media for the bacteria to congregate and invade the tissue. Therefore, he stated that in his opinion, with reasonable medical certainty, the infection was caused by the wearing of the boots.

Dr. Richard M. Gross is the orthopedic surgeon who performed the necessary surgery on Mr. Klauschie in August of 1979. As a part of his opinion as to causation, he referred to Mr. Klauschie's diabetic condition, which in turn caused a loss of sensation in his foot. Therefore, he opined, he was allowed to develop a pressure sore from the wearing of rubber boots which in turn resulted in a necrotic vascular ulcer. The infection then followed. In the doctor's own words: "The osteomyelitis is an expression of an infection which sets down once the necrotic vascular ulcer is formed and this is a vascular injury as the primary injury in this man. The infection is a subsequent problem. But it is all in my opinion related back to the pressure injury of wearing the boots in the packing house." He went on to explain that the blister was just an expression of the vascular injury and the ulcer a step beyond the blister.

Dr. Calvin Davis, a physician and associate professor of internal medicine at the University of Nebraska, who is a specialist in infectious diseases, testified on behalf of Argonaut. He had not examined either Mr. Klauschie or his records, and testified only on the basis of hypothetical questions. He stated that both staph epidermitis and Proteus mirabilis are common in the environment and are no more likely to be found in a packing plant than in a home or hospital. However, staph epidermitis is part of the normal skin flora of human beings, and Proteus mirabilis is a part of the normal intestinal bacterial flora. He also offered that, with a couple of exceptions, it was almost unheard of for either bacteria to invade the skin in the absence of a preexisting wound or infection in that area. Interestingly enough, he said that the second most common clinical situation involving Proteus

mirabilis involves people who have ulcers on their feet as a result of diabetes and who have had a previous infection where it comes in as a secondary invader. Dr. Davis concluded by giving as his opinion that neither of these organisms are peculiar to the beef slaughtering industry, and are commonly found in infections in the general public, unrelated to packinghouse environment.

The Workmen's Compensation Court, on rehearing, with one judge dissenting, found that the pressure sore which degenerated into a blister formation and necrotic tissue was caused by the rubber boots which Mr. Klauschie was required to wear in his employment; that a bacterial invasion through that sore by staph epidermitis and Proteus mirabilis occurred on or about July 1, 1979, or in any event, not earlier than April 15, 1979; that the wearing of boots created ideal conditions for the invasion and growth of the infection, without which it would not have occurred; that the osteomyelitis and ultimate amputation resulted from that aggravated infection; and that Mr. Klauschie suffered an injury as a result of an accident arising out of and in the course of his employment, for which he is entitled to benefits as provided under the Nebraska workmen's compensation law. The final conclusion of the compensation court was that the accident causing the compensable injury and disability was the bacterial invasion of Mr. Klauschie's system which occurred after April 15, 1979, during the period when Argonaut was the insurer.

With the exception of the last conclusion drawn by the Workmen's Compensation Court, we have no problem affirming all the foregoing findings of fact. They are supported by sufficient evidence in the record and have the same force and effect as a jury verdict in a civil case, and, not being clearly wrong, will not be disturbed on appeal. *Mack v. Dale Electronics, Inc.*, 209 Neb. 367, 307 N.W.2d 814 (1981). The critical issue for us to decide is whether or

not the bacterial invasion of Mr. Klauschie's system was an accident arising out of and in the course of his employment by Union Packing, as determined by the Workmen's Compensation Court.

Two general rules expressed by the quotations to follow must be kept in mind. "The term 'arising out of' describes the accident and its origin, cause, and character, i.e., whether it resulted from the risks arising within the scope or sphere of the employee's job. The term 'in the course of' refers to the time, place, and circumstances surrounding the accident. The two phrases are conjunctive and the claimant must establish by a preponderance of the evidence that both conditions exist." *Stoll v. School Dist. (No. 1) of Lincoln*, 207 Neb. 670, 672, 301 N.W.2d 68, 71 (1981). "'The primary purpose of the workmen's compensation act is to insure an employee against accidental injury arising out of and in the course of his employment. To accomplish this purpose the act should be liberally construed, not to find that liability exists without the required quantum of proof, but to include within the protection of the act by liberal interpretation all injuries arising out of and in the course of the employment which the act does not clearly exclude. A strict interpretation should not be resorted to in order to accomplish such exclusion.'" *White v. Western Commodities, Inc.*, 207 Neb. 75, 86, 295 N.W.2d 704, 711 (1980).

Dr. Brannen testified that the sole cause of Mr. Klauschie's injury and disability was the result of his employment, i.e., the wearing of the boots. The physician performing the surgery, Dr. Gross, stated that in his opinion all of Mr. Klauschie's troubles related back to the pressure injury caused by wearing the boots. Finally, Dr. Davis, although expressing no opinion as to the cause of the sore on Mr. Klauschie's foot, did say that it was almost unheard of for either bacteria to invade the skin in the absence of a preexisting wound or

infection in that area. Although the medical testimony differs as to whether the skin break, the vascular injury, or the bacterial invasion was the causative factor in the resultant amputation and disability, at least Dr. Brannen and Dr. Gross agree that the injury arose in the course of Mr. Klauschie's employment. Even Dr. Davis agreed that a wound or infection was necessary to allow the invasion of the disability-causing bacteria, and he had nothing upon which to base an opinion as to the cause of that wound or infection. And even though Dr. Davis' testimony could be said to be in conflict with the other two witnesses, we have said that where a record presents nothing more than conflicting medical testimony, we will not substitute our judgment for that of the Workmen's Compensation Court. *Riha v. St. Mary's Church & School, Inc.*, 209 Neb. 539, 308 N.W.2d 734 (1981).

The next question to consider is whether or not there was an accident arising out of the employment. Neb. Rev. Stat. § 48-101 (Reissue 1978). An accident is defined as "an unexpected or unforeseen injury happening suddenly and violently . . . and producing at the time objective symptoms of an injury." Neb. Rev. Stat. § 48-151(2) (Reissue 1978). "The terms injury and personal injuries shall mean only violence to the physical structure of the body and such disease or infection as naturally results therefrom." § 48-151(4). In dealing with these definitions, we have said that "the accident requirement of the act was satisfied if the cause of the injury was of accidental character or the effect was unexpected or unforeseen, and happened suddenly and violently. We also said that it was no longer necessary that the injury be caused by a single traumatic event, but the exertion in the employment must contribute in some material and substantial degree to cause the injury." *Crosby v. American Stores*, 207 Neb. 251, 254, 298 N.W.2d 157, 159 (1980).

In our opinion, the blister or vascular injury which

manifested itself in the early stages prior to April 15, 1979, as disclosed by the testimony cited above, constituted an accidental injury arising out of Mr. Klauschie's employment.

In reaching this conclusion, we are not ignoring the opinion of Cardozo, J., in *Matter of Connelly v. Hunt Furniture Co.*, 240 N.Y. 83, 147 N.E. 366 (1925), cited by appellee Klauschie. In that case, the plaintiff's deceased son was employed by an undertaker. In the course of his duties, he handled a corpse which had a gangrenous leg. Some of that matter entered a little cut in his hand and later spread to his neck when he scratched a pimple. The New York court said: "A trifling scratch was turned into a deadly wound by contact with a poisonous substance. We think the injection of the poison was itself an accidental injury within the meaning of the statute." *Id.* at 85, 147 N.E. at 366-67. In discussing whether the cut or the infection constituted the accident, the court went on to say: "The choice, however, is one that is needless and misleading. The whole group of events, beginning with the cut and ending with death, was an accident, not in one of its phases, but in all of them. If any of those phases had its origin in causes engendered by the employment, the act supplies a remedy." *Id.* at 86, 147 N.E. at 367.

We conclude that the infection and subsequent amputation and disability were phases in a whole group of events having their origin with the manifestation of the "pressure sore" discovered prior to April 15, 1979. Therefore, the Workmen's Compensation Court was correct in determining that Mr. Klauschie suffered a compensable injury and is entitled to benefits as determined by its award. That portion of the award we affirm. However, because of our determination that the compensable injury occurred prior to April 15, 1979, we remand the cause to the Nebraska Workmen's Compensation Court

with directions to enter such award against Fireman's Fund, rather than against Argonaut.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

KATHERINE ERVING, APPELLANT AND CROSS-APPELLEE, V. TRI-CON INDUSTRIES AND CORNHUSKER CASUALTY COMPANY, APPELLEES AND CROSS-APPELLANTS.

314 N.W.2d 253

Filed January 4, 1982. No. 44201.

1. **Workmen's Compensation: Appeal and Error.** The Supreme Court is not free in workmen's compensation cases to weigh the facts anew. The Supreme Court's standard of review must accord to the findings of the compensation court the same force and effect as a jury verdict in a civil case, and they will not be set aside unless clearly wrong.
2. ____: ____. In testing the sufficiency of the evidence to support the findings of fact made by the Nebraska Workmen's Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in his favor and he should have the benefit of every inference that can reasonably be drawn therefrom.
3. **Workmen's Compensation: Evidence.** The requirement of objective symptoms of an injury produced at the time of the accident is satisfied if the symptoms manifest themselves according to the natural course of such matters without any independent intervening cause being shown.
4. **Expert Witnesses.** Triers of fact are not required to take the opinions of experts as binding upon them.

Appeal from the Nebraska Workmen's Compensation Court. Affirmed.

A. James McArthur for appellant.

Baylor, Evnen, Curtiss, Grimit & Witt for appellees.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

KRIVOSHA, C.J.

The appellant, Katherine Erving, appeals from a judgment of the Nebraska Workmen's Compensation Court, entered by the court on rehearing, which found that while Mrs. Erving suffered a compensatory injury for which she was entitled to temporary compensation, she failed to establish that as a result of the accident she suffered any disability beyond September 21, 1980. Accordingly, the Workmen's Compensation Court denied any recovery to Mrs. Erving beyond September 21, 1980. It is from this order that Mrs. Erving appeals. Her employer, Tri-Con Industries, has cross-appealed, maintaining that not only did Mrs. Erving fail to establish that she sustained any injury after September 21, 1980, but, in fact, failed to establish that she sustained any injury resulting from an accident arising out of and in the course of her employment, and is therefore not entitled to any recovery. We believe that the compensation court was correct in all respects and its judgment entered on rehearing should be affirmed.

Mrs. Erving was employed by Tri-Con Industries on May 20, 1979. Her duties consisted primarily of what the record describes as crimping snowmobile bungee cords as they passed along an assembly line. This work apparently required her to utilize a scissors-like device against which she would apply pressure with her left palm while crimping a small metal disk onto the bungee cord with her right hand. It appears from the evidence that Mrs. Erving would perform this function some 20 to 30 times each day.

According to the testimony, Mrs. Erving began to experience a numbness in the fingers of her left hand in 1979 after she started working at Tri-Con Industries. She stated that she was performing her usual employment duties when this numbness gradually began, and as she continued working it became worse and worse. She continued working until September 24, 1979, when the pain and numbness in her left hand prevented her from continuing with her employment duties.

Ultimately, Mrs. Erving was referred to Dr. Benjamin Gelber. He examined her and concluded that she was suffering from a carpal tunnel syndrome, caused by her employment. The record discloses that Mrs. Erving had no similar difficulty prior to her employment with Tri-Con Industries.

In November of 1979 Mrs. Erving was hospitalized and carpal tunnel release surgery was performed upon her hand. In January of 1980 Dr. Gelber suggested to Mrs. Erving that she could return to work, but she maintained that because of constant pain in her hand and wrist she was unable to perform her employment duties at Tri-Con Industries. Dr. Gelber was of the opinion that Mrs. Erving's employment aggravated a preexisting condition in her left wrist and made it symptomatic, thus requiring the surgery. He was, however, of the further opinion that there was no permanent disability and he knew of no reason why Mrs. Erving could not return to full-time employment.

Dr. George Hachiya testified that he examined Mrs. Erving prior to the hearing. In his opinion, Mrs. Erving was experiencing an hysterical conversion reaction which results in a patient converting emotional pain into a physical symptom. Dr. Hachiya's conclusion was based upon three interviews. The initial interview was done on September 4, 1980, and lasted for approximately 30 minutes; a second interview was conducted on September 13, 1980, and lasted for 20 minutes; and a final interview was conducted on September 18, 1980, and lasted for approximately 35 or 40 minutes. Although Dr. Hachiya testified that, in his opinion, Mrs. Erving was suffering from conversion hysteria, he admitted that a psychological test conducted by a Dr. Wayne Price noted the absence of la belle indifference, an important characteristic of conversion hysteria. Dr. Price indicated in his report to Dr. Hachiya that he could not state with certainty that Mrs. Erving had a conversion neurosis, though it was possible. Dr. Hachiya explained the difference in opinion by simply

testifying that he did not agree with Dr. Price's conclusions. Dr. Hachiya did, however, testify that, in his opinion, Mrs. Erving still should be able to do some things but could not perform fine tasks or heavy lifting. He was unable to explain the reason for her condition.

In examining the order of the Workmen's Compensation Court, both as to its finding that Mrs. Erving suffered temporary disability, with which Tri-Con Industries disagrees, and with regard to the compensation court's refusing to find that Mrs. Erving suffered permanent injuries, with which Mrs. Erving disagrees, we must keep in mind certain basic rules involving decisions of the compensation court.

In *Kudera v. Minnesota Mining & Manuf. Co.*, 201 Neb. 235, 238, 266 N.W.2d 915, 917 (1978), we said: "This court is not free in workmen's compensation cases to weigh the facts anew. Our standard of review accords to the findings of the compensation court the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong." And, further, in *Buck v. Iowa Beef Processors, Inc.*, 198 Neb. 125, 127-28, 251 N.W.2d 875, 877 (1977), we said: "In testing the sufficiency of the evidence to support the findings of fact made by the Nebraska Workmen's Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in his favor and he should have the benefit of every inference that can reasonably be drawn therefrom."

As we have already indicated, we believe that those principles compel us to affirm the judgment of the Workmen's Compensation Court.

In the first instance, we cannot say as a matter of law that there is no evidence from which the compensation court could conclude that Mrs. Erving suffered a compensable injury arising out of and in the course of her employment. The medical testimony was sufficient to permit the compensation court to find Mrs. Erving's action in applying pressure to the scissors-like device

was sufficient to bring about the carpal tunnel syndrome which required her to have surgery. Tri-Con argues that there is no evidence of a compensable injury because there is no single event which produced a sudden or violent injury having objective symptoms. In *Crosby v. American Stores*, 207 Neb. 251, 298 N.W.2d 157 (1980), we were presented with a somewhat similar situation. In concluding that the employee had sustained a compensable injury under the workmen's compensation law, we noted at 254-55, 298 N.W.2d at 159: "The plaintiff's use of her hands to strike the pallets and boxes caused an injury which produced objective symptoms at the time. Each striking was a sudden and violent event. Although no one blow produced an injury severe enough to be compensable by itself, the cumulative effect of the repeated trauma resulted in an injury which produced disability. Most jurisdictions regard the time of accident as sufficiently definite if either the cause is reasonably limited in time or the result materializes at an identifiable point. 1B Larson, Workmen's Compensation Law § 39.00 (1980). The facts in this case satisfied both tests. The plaintiff's difficulty with her hands commenced immediately after she was transferred to stack and record. In that respect, this case may be distinguished from cases involving chronic conditions which develop over a period of many years where the injury cannot be traced to a particular job or activity of the workman."

And as we noted in *Wolfe v. American Community Stores*, 205 Neb. 763, 767, 290 N.W.2d 195, 198 (1980): "[T]he requirement of objective symptoms of an injury produced at the time of the accident is satisfied if the symptoms manifest themselves according to the natural course of such matters without any independent intervening cause being shown." We believe such is the case here.

We cannot say that the compensation court was in error when it found from the evidence that the action by Mrs. Erving in squeezing the bungee device pro-

duced her injury, resulting in the temporary disability. The evidence shows that she did not suffer from this affliction prior to her employment and that the injury was consistent with the type of work she was doing, though admittedly one may obtain this type of injury in other ways. The fact that it may be obtained in other ways does not make the compensation court's finding that it happened as a result of her employment in error.

Likewise, with regard to the matter of the permanent injury, we believe the same general principles must be applied. The compensation court found that Mrs. Erving was no longer disabled after September 21, 1980.

Mrs. Erving argues that where an expert testifies without contradiction or conflicting evidence, a court is required to accept the expert's testimony as true. That, of course, is not the rule in this jurisdiction. Triers of fact are not required to take the opinions of experts as binding upon them. *Swartz v. Hess, Inc.*, 188 Neb. 542, 198 N.W.2d 64 (1972). Furthermore, the testimony of Dr. Hachiya was not without conflict. First of all, Dr. Gelber testified that, in his opinion, Mrs. Erving should be able to return to work. The fact that Dr. Gelber is a neurosurgeon and not a psychiatrist does not in and of itself require the compensation court to ignore his testimony. Like all testimony of experts, it merely goes to the weight to be given. Moreover, Dr. Hachiya's testimony was neither unqualified nor absolute in nature. The testimony of all the witnesses at best produced a conflict which the compensation court as the trier of fact had to resolve. *Inserra v. Village Inn Pancake House*, 197 Neb. 168, 247 N.W.2d 625 (1976); *Brown v. Globe Laboratories, Inc.*, 165 Neb. 138, 84 N.W.2d 151 (1957); *Smith v. Platte Valley Public Power and Irrigation District*, 151 Neb. 49, 36 N.W.2d 478 (1949).

A workmen's compensation award cannot be based on possibility or speculation, and if an inference favorable to the claimant can only be reached on the basis thereof,

then he cannot recover. *Stevens v. Josten-Wilbert Vault Co.*, 182 Neb. 322, 154 N.W.2d 764 (1967); *Welke v. City of Ainsworth*, 179 Neb. 496, 138 N.W.2d 808 (1965).

While we have heretofore recognized that a workman is entitled to recover compensation for a neurosis if it is a proximate result of his injury and results in disability, see, *Cardenas v. Peterson Bean Co.*, 180 Neb. 605, 144 N.W.2d 154 (1966); *Lee v. Lincoln Cleaning & Dye Works*, 145 Neb. 124, 15 N.W.2d 330 (1944); *Haskett v. National Biscuit Co.*, 177 Neb. 915, 131 N.W.2d 597 (1964), where, as here, the compensation court resolved the conflict against Mrs. Erving, we are not able to say it was error. The compensation court was free to accept or reject the testimony of Dr. Hachiya, as it determined. Absent Dr. Hachiya's conclusions, the record is devoid of any evidence to support a claim that Mrs. Erving continues to be disabled.

The judgment of the compensation court is in all respects affirmed.

AFFIRMED.

WHITE, J., concurs in the result.

STATE OF NEBRASKA, APPELLEE, V.
HAROLD C. ISIKOFF, ALSO KNOWN AS
HERBERT SAMUEL CHRISTENSEN, JR., APPELLANT.

314 N.W.2d 30

Filed January 4, 1982. No. 44229.

Appeal from the District Court for Lincoln County: KEITH WINDRUM, Judge. Affirmed.

Donald E. Rowlands II of Baskins & Rowlands for appellant.

Paul L. Douglas, Attorney General, and Lynne Fritz for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and HASTINGS, JJ.

McCOWN, J.

The defendant was found guilty by a jury on a charge of escape and subsequently found to be an habitual criminal. The District Court sentenced the defendant to imprisonment for not less than 11 years nor more than 11½ years, the sentence to be served consecutively to other sentences previously imposed.

The defendant's principal assignments of error are grounded on his contention that the evidence was insufficient to establish the habitual criminal count, but he does not contest his guilt on the charge of escape. He does contend that the Nebraska habitual criminal act is unconstitutional.

On the habitual criminal count the State alleged that the defendant had previously been convicted, sentenced, and committed to prison in the State of South Carolina on four separate felony convictions specifically set out in the information. The defendant objected to the introduction of the authenticated copies of the judgments of conviction upon the grounds that the name of the defendant on those convictions was different than the defendant's, the convictions did not affirmatively show a commitment to prison, and that a silent record was insufficient to establish the constitutional validity of the guilty pleas which gave rise to the convictions.

The evidence introduced at the hearing on the habitual criminal charge, in addition to authenticated copies of the judgments of conviction, also contained the verbatim court proceedings of the entries of guilty pleas to each of the four felony charges. That record showed that the defendant was represented by counsel in each case and that in at least three of the four cases the arraignment was complete and thorough and in all respects in accordance with the standards for determining the validity of guilty pleas established by this court in *State v. Turner*, 186 Neb. 424, 183 N.W.2d 763 (1971).

The individual named in the South Carolina con-

victions was Herbert Christensen. In the present case the State produced witnesses who identified the defendant Isikoff as the same individual designated as Herbert Christensen in the South Carolina convictions, and records and fingerprint evidence established that the defendant Isikoff and Herbert Christensen were one and the same individual.

The defendant also argues that the certified copies of the convictions are insufficient because they do not show that the defendant was committed to prison thereafter. That argument was specifically rejected by this court in *State v. Addison*, 197 Neb. 482, 249 N.W.2d 746 (1977).

The defendant contends that the Nebraska habitual criminal act is unconstitutional as the county attorney has unrestricted discretion to file or not to file habitual criminal charges. The argument is unpersuasive. This court has consistently held that the Nebraska habitual criminal act is constitutional both under the U.S. Constitution and under the Nebraska Constitution. See, *State v. Goodloe*, 197 Neb. 632, 250 N.W.2d 606 (1977); *State v. Fowler*, 193 Neb. 420, 227 N.W.2d 589 (1975); *State v. Losieau*, 184 Neb. 178, 166 N.W.2d 406 (1969).

The Nebraska habitual criminal act does not purport to create a new and separate criminal offense, but provides merely that the repetition of criminal conduct aggravates the guilt and justifies greater punishment. The increased punishment for the latest felony is a court determination and not one for the jury.

The defendant's remaining assignments of error are without merit.

The judgment of the District Court is affirmed.

AFFIRMED.

WHITE, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. KIM E. BETTS, APPELLANT.

314 N.W.2d 257

Filed January 4, 1982. No. 44326.

Drunk Driving: Witnesses: Evidence. Testimony by witnesses as to acts done and words spoken by a defendant as the basis for an opinion that the defendant was under the influence of intoxicating liquor is direct or positive, and not circumstantial, evidence.

Appeal from the District Court for Red Willow County: JACK H. HENDRIX, Judge. Affirmed.

Mousel & Burger, P.C., for appellant.

Paul L. Douglas, Attorney General, and Ralph H. Gillan for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

BOSLAUGH, J.

The defendant was convicted of driving while under the influence of alcoholic liquor and sentenced to 1 year's probation and fined $100. The judgment and sentence were affirmed on appeal by the District Court.

The defendant has appealed and contends the evidence was insufficient to support the finding of guilty and an instruction to the jury was erroneous.

The record shows that the defendant was observed by a police officer driving his automobile down B Street in McCook, Nebraska, at a rate of speed in excess of 45 miles per hour in a 25-mile-per-hour zone. The officer testified that when the defendant's vehicle turned the corner at East 6th and B Streets, the tires squealed and the vehicle nearly hit the median. The officer then followed the vehicle south on U.S. Highway 83.

The defendant's vehicle was weaving back and forth between the centerline and the right shoulder of the road, and at one point crossed the centerline and

traveled down the left lane of the road. The officer drove at speeds ranging from 60 to 75 miles per hour, with the patrol car's siren and flashing red lights in operation, but was unable to stop the defendant until he had reached a point approximately 3 miles south of McCook.

When the defendant walked back toward the police cruiser, he was swaying and wobbling back and forth. The officer testified that it took some time for the defendant to respond to requests to see his operator's license and vehicle registration, and the officer had to request these items several times. When the defendant returned to his vehicle to obtain the registration, he lost his balance twice and leaned against the side of the car. The officer noticed an odor of alcoholic beverage about the person of the defendant. His speech was slurred and the pupils of his eyes, which were dilated, did not respond readily to light.

A number of field sobriety tests were administered to the defendant to test his manual dexterity and coordination. During these tests, the defendant's balance was poor and he could not perform the tests properly. A second officer also noticed the odor of alcoholic beverage about the defendant's person.

After the administration of the field sobriety tests, the officer concluded that the defendant was intoxicated. He was then placed under arrest and taken to police headquarters.

The defendant admitted that between 7 or 7:30 p.m. and midnight, or shortly thereafter, he had consumed approximately three beers and three mixed drinks.

The defendant argues that the evidence of the State was circumstantial and did not exclude a hypothesis that his condition might have been caused by something other than intoxicating liquor.

The police officers in this case testified as to what they saw, heard, and smelled. This was direct evidence, not circumstantial, and was the basis for their opinion that the defendant was under the influence of intoxicat-

ing liquor.

In *State v. Lewis*, 177 Neb. 173, 128 N.W.2d 610 (1964), a case involving similar facts, we held that the testimony of the officers was direct evidence and not circumstantial. We said at 177, 128 N.W.2d at 613: "The alleged circumstantial evidence in the instant case is the facts testified to by the patrolman and sheriff as a foundation for their opinions that defendant was intoxicated. . . . Circumstantial evidence is defined as the attendant facts and circumstances from which a principal fact may be inferred by the usual processes of reasoning. Where the existence of the attendant facts and circumstances is testified to by witnesses, the evidence of the principal fact is said to be direct or positive. Otherwise stated, direct evidence is proof of facts by witnesses who saw acts done or heard words spoken, while circumstantial evidence is proof of collateral facts and circumstances from which the mind infers the conclusion that the fact sought to be established in fact existed. . . . The evidence of the patrolman and sheriff in the present case was direct or positive, and not circumstantial."

The fact that there was a strong odor of alcoholic beverage about the person of the defendant tended to negative drugs or other possibilities as the cause of the defendant's condition. The defendant testified at the trial but made no suggestion that his condition was due to any cause other than intoxicating liquor. His theory of the case was that he was not intoxicated.

The evidence of the State was sufficient to support a finding of guilt beyond a reasonable doubt.

The instruction complained of was taken from the opinion in *O'Neill v. Henke*, 167 Neb. 631, 94 N.W.2d 322 (1959), and was not erroneous.

The judgment of the District Court is affirmed.

AFFIRMED.

DONALD JOHN GERHARDT, SPECIAL ADMINISTRATOR OF THE ESTATE OF LENA AUGUSTA GERHARDT, DECEASED, APPELLANT, V. WILLIAM EMMITT MCCHESNEY, APPELLEE.

314 N.W.2d 258

Filed January 8, 1982. No. 43521.

1. **Summary Judgments.** Where the evidence is such that reasonable minds can draw but one conclusion therefrom, it is the duty of the court to decide the question as a matter of law rather than submit it to a jury. However, where reasonable minds may differ as to the conclusions or inferences to be drawn from the evidence, or where there is a conflict in the evidence, such issues must be submitted to the jury.
2. **Negligence: Pedestrians.** One who attempts to cross a street at a point between intersections without looking is guilty of such negligence as would bar recovery as a matter of law.
3. ____:____. A pedestrian who crosses a street between intersections is required to keep a *constant* lookout for his or her own safety in all directions of anticipated danger.
4. ____:____. A pedestrian who crosses a street between intersections is charged with the exercise of a greater degree of care than one who crosses a street at a crosswalk where protection is afforded by giving the pedestrian the right-of-way.
5. ____:____. When one, being in a place of safety, sees or could have seen the approach of a moving vehicle in close proximity to him or her and suddenly moves from the place of safety into the path of such vehicle and is struck, such conduct constitutes contributory negligence more than slight as a matter of law and precludes recovery.
6. **Wrongful Death: Presumptions: Negligence.** The presumption in an action for wrongful death that a decedent exercised reasonable care for his or her own safety has no probative force, is a mere rule of law, obtains only in the absence of direct or circumstantial evidence justifying an inference on the subject, and disappears when evidence is produced.

Appeal from the District Court for Douglas County: JOHN T. GRANT, Judge. Affirmed.

Warren C. Schrempp and John J. Hanley for appellant.

Gross, Welch, Vinardi, Kauffman, Day & Langdon for appellee.

Heard before BOSLAUGH, MCCOWN, CLINTON, and BRODKEY, JJ., and BLUE, District Judge.

BRODKEY, J.

Donald John Gerhardt, special administrator of the estate of Lena Augusta Gerhardt, brought this action for wrongful death, resulting from an automobile-pedestrian accident, in the District Court of Douglas County, Nebraska, against the operator of the motor vehicle, defendant William Emmitt McChesney. In his petition filed on August 16, 1976, the plaintiff alleged negligence on the part of the defendant as follows: (1) Failing to maintain a proper lookout; (2) Failing to maintain reasonable control of his motor vehicle; (3) Driving said vehicle at an excessive rate of speed under the circumstances; (4) Failing to brake, swerve, or otherwise avoid striking plaintiff's decedent; and (5) Failing to exercise ordinary care. The defendant admitted to the occurrence of the accident, denied negligence, and alleged the following specific acts of contributory negligence on the part of the decedent: (1) Failing to keep a proper lookout for the defendant's vehicle; (2) Walking onto Harney Street at a point other than an intersection; (3) Failing to stop to permit defendant's vehicle to proceed on Harney Street; and (4) Failing to yield the right-of-way to defendant's vehicle. The defendant filed a motion for summary judgment on January 22, 1980, alleging that there were no material issues of fact and that, based upon the exhibits offered at the time of the hearing, the court should enter judgment for the defendant as a matter of law. At the hearing on the motion for summary judgment, the court took the motion under advisement, stating: "In making my ruling on defendant's Motion for Summary Judgment I shall consider only Exhibit Nos. 1 through 8 and plaintiff's Answers to Interrogatories. No further evidence will be considered." Exhibits 1 through 5, contained in the bill of exceptions, are photographs of the scene of the accident; exhibit 6 is the accident report; exhibit 7 is the deposition of the defendant; and exhibit 8 is the deposition of a witness, Gregory M. Herrek. The trial court entered its order on said motion

on March 27, 1980, granting the motion and dismissing the case at plaintiff's costs. We affirm.

The evidence in the record on appeal reveals that at about 2 p.m., September 20, 1974, the plaintiff's decedent, a woman 65 years of age, was crossing Harney Street on foot at a point between 23rd and 24th Streets in Omaha, Nebraska, when she was struck by a car driven by the defendant. At the time of the accident, the defendant was proceeding east on Harney Street, a one-way street, in the lane closest to the south curb lane. The weather that day was overcast; however, the pavement was dry and there is no indication that visibility in the area was obscured by any other factors. The defendant was driving at an estimated speed of 20 to 25 miles per hour. There is little question that at the time she was struck by defendant's automobile, the decedent was attempting to cross Harney Street from the south side of the street and at a point in the middle of the block where there was no marked crosswalk. This is made clear from the photographs of the scene of the accident received in evidence. In addition, the defendant testified, in his deposition received in evidence, as follows: "Q. Did you ever see the lady that you eventually struck before you struck her? A. Just instantly before. Q. Where was she instantly before? A. She was out in front of me almost in a flash, it seemed, or should I say — I didn't realize she was going to be in front of me until she was in front of me, if that answers your question. If you can put yourself in my position, I suppose we see people every day standing by the curb or standing by a car, but they wait for us as we go by, but this woman did not wait. She stepped out in front." Even if it be considered that the foregoing testimony by the defendant was not absolutely clear as to whether the decedent was crossing from the south side to the north side of the street at the time in question or possibly had been crossing from the north curb to the south curb, the matter is set at rest, we believe, by the

allegations contained in the pleadings in this case. Plaintiff's petition filed in this matter alleges, among other things: "That on September 20, 1974 at approximately 3:00 p.m. Plaintiff's decedent was attempting to cross Harney Street at approximately 23rd Street; that said crossing was to be made in a south to north direction . . . ." Also the answer of the defendant, filed in response to plaintiff's petition, alleges that "plaintiff's decedent was crossing from south to north." These judicial admissions contained in the pleadings of the parties would seem to lay at rest any possible question as to where the decedent had been immediately prior to being struck by defendant's automobile. The testimony of the witness Gregory M. Herrek, as set out in his deposition received in evidence, does not in any way contradict this conclusion but, in effect, reinforces that conclusion. He was standing on the south side of the street near the scene of the accident. He testified he did not see the decedent but his first knowledge of the incident was when he heard the screech of brakes and a thump. He turned around and saw the decedent's body flying through the air in an arc, landing at a point about 30 feet east of where he was standing, and in the eastbound lane of traffic on the south side of the street nearest the curb. The conclusion is inescapable that as the decedent crossed the street, she emerged from a position between two cars which were parked in the south curb lane. There is evidence that the plaintiff's decedent was struck by the defendant's vehicle on the right front hood of defendant's car at a point a few feet north of the parked vehicles. The defendant states that he did not see the decedent until she was right in front of his car and that he applied his brakes just before striking her. The decedent was subsequently taken to a local hospital where she died.

The principal issue in this appeal is whether or not the conduct of plaintiff's decedent was such that it constituted contributory negligence more than slight so as to bar recovery as a *matter of law.* In this regard,

this court has stated that where the evidence is such that reasonable minds can draw but one conclusion therefrom, it is the duty of the court to decide the question as a matter of law rather than submit it to a jury. *Hoefer v. Marinan*, 195 Neb. 477, 238 N.W.2d 900 (1976); *Floridia v. Farlee*, 201 Neb. 39, 266 N.W.2d 204 (1978). However, where reasonable minds may differ as to the conclusions or inferences to be drawn from the evidence, or where there is a conflict in the evidence, such issues must be submitted to the jury. *Hansen v. Hasenkamp*, 192 Neb. 530, 223 N.W.2d 44 (1974); *Ybarra v. Wassenmiller*, 206 Neb. 164, 291 N.W.2d 725 (1980).

In reviewing the question of whether the evidence was sufficient to submit the issues of negligence and contributory negligence to a jury, certain principles particularly applicable in the case of pedestrian accidents have been stated and uniformly applied by this court. The law is well established that one who attempts to cross a street at a point between intersections without looking is guilty of such negligence as would bar recovery as a matter of law. *Palmer v. McDonald*, 171 Neb. 727, 107 N.W.2d 655 (1961); *Hrabik v. Gottsch*, 198 Neb. 86, 251 N.W.2d 672 (1977). Furthermore, a pedestrian who crosses a street between intersections is required to keep a *constant* lookout for his or her own safety in all directions of anticipated danger. *Doan v. Hoppe*, 133 Neb. 767, 277 N.W. 64 (1938); *Merritt v. Reed*, 186 Neb. 561, 185 N.W.2d 261 (1971); *Hrabik v. Gottsch, supra.* A pedestrian who crosses a street between intersections is charged with the exercise of a greater degree of care than one who crosses a street at a crosswalk where protection is afforded by giving the pedestrian the right-of-way. *Merritt v. Reed, supra.* It has also been held that when one, being in a place of safety, sees or could have seen the approach of a moving vehicle in close proximity to him or her and suddenly moves from the place of safety into the path of such

vehicle and is struck, such conduct constitutes contributory negligence more than slight as a matter of law and precludes recovery. *Lileikis v. Kudirka*, 180 Neb. 742, 145 N.W.2d 441 (1966); *Blum v. Brichacek*, 191 Neb. 457, 215 N.W.2d 888 (1974); *Hrabik v. Gottsch, supra; Ybarra v. Wassenmiller, supra.*

In the present case, the facts indicate that the accident occurred during the afternoon hours of September 20, 1974, and that, while the sky was overcast, there was nothing presented in the record which would have prevented the decedent from observing the defendant's vehicle proceeding on Harney Street. The evidence is undisputed that if the plaintiff's decedent had looked for a car on the road before leaving her place of safety on the sidewalk, she could have seen the defendant's approaching vehicle. No reasonable excuse for not observing the defendant's car is presented in the record. "We have consistently held that when a pedestrian crosses a street between intersections without looking at all, or looks straight ahead without glancing to either side, or is in a position where he cannot see, and proceeds regardless of that fact, the situation ordinarily presents a question for the court. Where the pedestrian looks but does not see an approaching automobile, or sees it and misjudges its speed or its distance from him, or for some other reason concludes that he could avoid injury to himself, a jury question is usually presented." *Hrabik v. Gottsch, supra* at 89-90, 251 N.W.2d at 675. See, also, *Doan v. Hoppe, supra.* While there is no evidence in the record to indicate that at any time prior to the accident the plaintiff's decedent looked for automobiles on Harney Street, it seems clear that she could not have been keeping a *constant* lookout for her safety while attempting to cross the street, as required under the above-cited authorities. Moreover, even if it be argued that she *may* have looked for approaching automobiles, the conclusion is inescapable that she had proceeded from a place of safety into the path of defendant's vehicle.

In his brief on appeal, however, the plaintiff argues that there is a presumption of due care exercised by the decedent in the situation before us, and that the rule is that where there is no eyewitness to an accident causing death, the presumption is raised by the instinct of self-preservation on behalf of deceased that she was not guilty of contributory negligence. The foregoing presumption was reiterated and approved by this court as late as the case of *Caradori v. Fitch*, 200 Neb. 186, 263 N.W.2d 649 (1978). We do not believe that principle is applicable under the facts of the instant case inasmuch as there is evidence in the record on that issue. The presumption of due care obtains only in the absence of any evidence, direct or circumstantial, on the issue of decedent's contributory negligence. In *Pearson v. Richard*, 201 Neb. 621, 629, 271 N.W.2d 326, 330 (1978), this court stated: "[T]he presumption in an action for wrongful death that a decedent exercised reasonable care for his own safety has no probative force, is a mere rule of law, obtains only in the absence of direct or circumstantial evidence justifying an inference on the subject, and disappears when evidence is produced."

We conclude, therefore, that the trial court was correct in sustaining defendant's motion for summary judgment in this case, that there was no question of material facts involved, nor any question as to the inferences or conclusions to be derived from such facts. We also conclude that plaintiff's decedent was guilty of contributory negligence more than slight as a matter of law, under the authorities above cited, and may not recover in this action. The judgment of the District Court must be, and hereby is, affirmed.

AFFIRMED.

GLADYS PAULINE STERNER ET AL., APPELLANTS, V. LEATHA NELSON, SUCCESSOR PERSONAL REPRESENTATIVE OF THE ESTATE OF MARY VIOLA ROSE, ET AL., APPELLEES.

314 N.W.2d 263

Filed January 8, 1982. No. 43528.

1. **Real Estate: Estates: Deeds: Wills.** It is impossible to convey an absolute title to real estate in fee simple by deed or will, and at the same time in the same instrument convey to the same person a limited right or title in the same land.
2. _____: _____: _____: _____. If a deed or will conveys an absolute title in fee simple, an inconsistent clause in the instrument attempting merely to limit that title or convey to the same person a limited title in the same land will be disregarded.
3. **Estates.** An absolute title estate or property is a fee simple estate; it is an estate without end or limitations and the largest estate a person can possibly have.
4. **Estates: Wills.** Where there is a grant, devise, or bequest to one in general terms only, expressing neither fee nor life estate, and there is a subsequent limitation over of what remains at the first taker's death, if there is also given to the first taker an unlimited and unrestricted power of absolute disposal, express or implied, the grant, devise, or bequest to the first taker is construed to pass a fee. The attempted limitation over, following a gift which is in fee with full power of disposition and alienation, is void.

Appeal from the District Court for Otoe County: RAYMOND J. CASE, Judge. Affirmed.

Rodney J. Palmer and William F. Davis for appellants.

Truman Clare and Timothy J. Cuddigan of Marks, Clare, Hopkins, Rauth & Cuddigan and Richard Hoch of Hoch & Steinheider for appellees.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

KRIVOSHA, C.J.

The instant case involves the construction of the last will and testament of Oscar Wurtele, deceased. The appellants appeal from a summary judgment entered

by the District Court for Otoe County, Nebraska, finding that the nature of the devise and bequest made by Oscar Wurtele to his wife, Mary Viola Wurtele, by his last will and testament was a fee simple absolute. We believe the trial court was correct and affirm the judgment.

As noted, the appeal herein arises out of the last will and testament of Oscar Wurtele, executed on August 4, 1939. While the will is simple and to the point, it is not a model for estate planners. It reads in total as follows:

"I, the undersigned, Oscar Wurtele do hereby make, publish and declare the following as and for my Last Will and Testament:

"I hereby give, devise and bequeath all of my property of every kind and nature to my wife Mary Viola Wurtele to be her property *absolutely with full power in her to make such disposition of said property as she may desire;* conditioned, however, that if any of said property is remaining upon the death of said Mary Viola Wurtele, or in the event that she predeceases me then and in such event such of said property as remains shall vest in my foster daughter Gladys Pauline Sterner and her children.

"I hereby nominate and appoint my said wife, Mary Viola Wurtele, of Nebraska City, Nebraska, as executrix of this My Last Will and Testament.

"Dated at Nebraska City, Nebraska, this 4th day of August, 1939. Oscar Wurtele." (Emphasis supplied.)

Following Oscar Wurtele's death in 1955 his will was admitted to probate in the county court of Otoe County, Nebraska, and all of the property which Oscar Wurtele owned at the time of his death was devised and bequeathed to his wife, Mary Viola Wurtele, to be hers absolutely. Certain of the property, including two commercial buildings, a farm, and a residence, were held in joint tenancy and passed to Mary Viola Wurtele by action of law and are not in any manner involved in this case. Two other commercial buildings, however,

did pass to Mary Viola Wurtele by reason of the will of her husband, Oscar Wurtele, as well as certain personal property having an estimated value of $19,000. Mary Viola Wurtele thereafter married one Aaron Rose with whom she lived until her death on March 7, 1978. Mary Viola Rose died testate leaving her property to various individuals, including her husband, Aaron, and certain other nieces and nephews, but leaving no property to the appellants herein who are the foster daughter and her children referred to in the last will and testament of Oscar Wurtele. Aaron Rose died on June 24, 1979.

The evidence further discloses that in 1963 Mary Viola Rose sold the four commercial buildings for a total sale price of $70,000. No division of the sale price was made between the joint tenancy property and the property received under the will of her former husband. It is, however, clear from the evidence that none of the original property devised and bequeathed to Mary Viola Wurtele remained at the time of her death, though she did die owning property, some of which may have been purchased from the proceeds of either the personal property or the sale of the real estate. Following a hearing, the trial court found that the will of Oscar Wurtele devised and bequeathed all of his property to his wife, Mary Viola Wurtele, in fee simple absolute, and granted the personal representative's motion for summary judgment. The trial court's opinion provides in part as follows: "The Court is of the opinion that the language in the Oscar Wurtele will is so precise as to create a fee simple title in the wife, Mary Viola Wurtele."

Appellants have raised a number of errors, but the principal issue which needs to be addressed is whether the devise and bequest by Oscar Wurtele to Mary Viola Wurtele was a fee simple absolute or merely a life estate with authority to dispose of so much of the property as she chose during her lifetime. For, obviously, if we conclude, as the trial court did, that the

devise and bequest was a fee simple absolute, then Mary Viola Rose was entitled to do whatever she wished with her property, both during her lifetime and upon her death, and Gladys Pauline Sterner and her children would not be entitled to any portions of the property remaining at the death of Mary Viola Rose. While the issue as so stated is clear, the decisions of our court concerning this matter are not so clear. It is appropriate that we examine this question in order to resolve the dispute.

The general and majority rule is as expressed in 28 Am. Jur. 2d *Estates* § 94 at 198-99 (1966), wherein it provides in part: "It is a well-settled, general rule that where there is a grant, devise, or bequest to one in general terms only, expressing neither fee nor life estate, and there is a subsequent limitation over of what remains at the first taker's death, if there is also given to the first taker an unlimited and unrestricted power of absolute disposal, express or implied, the grant, devise, or bequest to the first taker is construed to pass a fee. The attempted limitation over, following a gift which is in fee with full power of disposition and alienation, is void. Most of the cases arriving at this conclusion are based upon the reasoning that the well-settled rule that a general or indefinite grant or gift, coupled with an absolute or unlimited power or disposition, passes a fee applies with full force and effect even though the will purports to make a gift over of whatever may remain at the death of the grantee or devisee, the purported gift over merely being an invalid repugnancy."

The American Jurisprudence annotation cited above then goes on to note that the general rule is consistently applied even in cases involving wills of slightly different but substantial tenor, a number of which are similar to the language of the Wurtele will.

One may likewise find cases in Nebraska and other jurisdictions to support the general view expressed in the American Jurisprudence citation. In the case of

Moffitt v. Williams, 116 Neb. 785, 788, 219 N.W. 138, 139 (1928), we said: "'It has been regarded by the courts that it is impossible to convey an absolute title to real estate in fee simple by deed or will, and at the same time in the same instrument convey to the same person a limited right or title in the same land. It therefore follows that when there was an attempt to do so, and no other disposition of the land was made in the will, the courts, on the theory that real estate must have an owner, rejected the attempt to convey the limited title, and treated the conveyance as of a fee simple title.'

". . . 'The settled rule of law is that, if a deed or will conveys an absolute title in fee simple, an inconsistent clause in the instrument attempting merely to limit that title or convey to the same person a limited title in the same land will be disregarded.'"

Cases may likewise be found in a majority of the jurisdictions which support the general rule. In the case of *Moran v. Moran*, 143 Mich. 322, 323, 106 N.W. 206 (1906), the Michigan Supreme Court was presented a will which provided in part as follows: "'I give and bequeath to my beloved wife . . . all my property real and personal, of every name, nature and description to be hers absolutely, providing however, that if at her death any of the said property be still hers, then the residue still hers shall go to my, not her, nearest heir or heirs.'" The court held that such language created a fee simple absolute in the wife and the provision for the property remaining was void and unenforceable.

In *Hicks v. Fairbanks' Heirs*, 208 Okla. 346, 347, 256 P.2d 169, 169-70 (1953), the Oklahoma Supreme Court was presented a will which provided in part: "'. . . I give, devise and bequeath unto my beloved wife, Ada Fairbanks all of my estate real and personal and mixed to have and to hold to her and her heirs forever.

"'. . . [S]hould any of my estate remain at the death of my said wife Ada Fairbanks undisposed of then in that

event I give and bequeath such remainder to my nephew . . . . This provision is not intended to restrain or hamper my said [wife] . . . . . in any manner . . she is to have my entire estate as above provided—and this provision is only to take effect in case any of my estate remains undisposed of at the death of my said wife Ada Fairbanks.'"

The Supreme Court held that since the widow had been given an absolute power of disposition, she had taken a fee simple title and there was nothing remaining to be taken by the nephew. In so holding the Oklahoma court in *Hicks v. Fairbanks' Heirs*, *supra* at 350, 256 P.2d at 172, said: "'It is a well-settled rule, firmly supported by a great numerical preponderance of the authorities, that where there is a devise or bequest to one in general terms only, expressing neither fee nor life estate, and there is a subsequent limitation over of what remains at the first taker's death, if there is also given to the first taker an unlimited and unrestricted power of absolute disposal, express or implied, the devise or bequest to the first taker is construed to pass a fee. . .'"

In *Langston v. Hunt, Adm'r*, 269 Ark. 328, 329, 601 S.W.2d 833, 834 (1980), the Arkansas court was presented with a will which provided in part: "'I give to my beloved wife, Ethel Deliah Jones, all of my property, both real and personal, of every kind and character, wherever situated. . . . At the death of my said wife . . . I desire that all of my property of which she dies seized of shall be divided among her nearest relatives and my nearest relatives, share and share alike.'"

Notwithstanding the language of the will, the court held that the devise was of a fee simple and that the remainder over to the heirs was unenforceable. In doing so the Arkansas court said in *Langston v. Hunt, Adm'r*, *supra* at 330, 601 S.W.2d at 834: "The present rule simply stated is that a testator cannot give an estate in fee simple by clear and concise language

and subsequently diminish or destroy the devise by use of other language. In other words, once the fee is given to a person or class of persons or other devisee, it cannot be thereafter taken away or diminished unless the terms are clear, unequivocal, and demonstrate the intent to limit the prior devise."

To a similar effect see *Hendrix v. Hester*, 385 So. 2d 990 (Ala. 1980); *Quickel v. Quickel*, 261 N.C. 696, 136 S.E.2d 52 (1964); *Virginia National Bank v. United States*, 307 F. Supp. 1146 (E.D. Va. 1969), *aff'd* 443 F.2d 1030 (4th Cir. 1971); *Jackson v. Ku Klux Klan*, 231 Ky. 370, 21 S.W.2d 477 (1929); *Shaw v. Wertz*, 369 S.W.2d 215 (Mo. 1963); *Rawlings v. Briscoe*, 214 Va. 44, 197 S.E.2d 211 (1973).

While this might at first blush seem to make the disposition of this matter relatively easy, unfortunately there are cases to be found in Nebraska which appear to hold to the contrary. The principal case is *Merrill v. Pardun*, 125 Neb. 701, 251 N.W. 834 (1933). In *Merrill*, *supra* at 703, 251 N.W. at 835, the testator's will provided in part as follows: "'I give and bequeath to my wife, Maggie Brown, all the rest, residue and remainder of my property of whatever kind and wherever situated to be hers absolutely. It is my request, however, that any of said property remaining on the death of my said wife, shall go to my daughter, Mildred I. Merrill, to be hers absolutely and in case of her prior death then to her children, share and share alike.'" This court held that the conveyance was simply a life estate with the power to dispose during one's lifetime. In so holding, we said in *Merrill* at 706, 251 N.W. at 836: "The general rule under the common law is that, where an estate in fee simple is given in one clause of a will, subsequent clauses attempting to cut down said estate would be void; but in Nebraska, on account of the *peculiar provisions* of our statute regarding the intentions of the testator, in construing a will it is held that, where a will in one clause makes an apparently absolute bequest of

property, but in a subsequent clause makes a further bequest of the remainder after the death of the legatee taking under the first clause, the two clauses are to be construed and considered together to ascertain the true character of the estate in fact granted by the first clause; and in such case, contrary to the ancient rule at common law, the second clause is effective and operative to define and limit the estate granted by the first to and as a life estate with power of disposition, and the second is effective and operative to grant an estate in remainder in the unused, unexpended or undisposed property granted for life by the first." (Emphasis supplied.) As support for such position the *Merrill* case cites the cases of *In re Estate of Darr*, 114 Neb. 116, 206 N.W. 2 (1925); *Krause v. Krause*, 113 Neb. 22, 201 N.W. 670 (1924); *Heyer v. Heyer*, 110 Neb. 784, 195 N.W. 109 (1923); and *Grant v. Hover*, 103 Neb. 730, 174 N.W. 317 (1919).

However, neither the rationale of the *Merrill* case nor the earlier decisions seems to justify abandoning the general common-law majority rule for what appears to have developed as the Nebraska rule.

In the first instance the *Merrill* decision maintains that we are *compelled* to reach a separate decision because of the "peculiar provisions of our statute regarding the intentions of the testator." The peculiar provisions apparently refer to what was then cited as Comp. Stat. § 76-109 (1929), and which is now Neb. Rev. Stat. § 76-205 (Reissue 1976). It reads: "In the construction of every instrument creating or conveying, or authorizing or requiring the creation or conveyance of any real estate, or interest therein, it shall be the duty of the courts of justice to carry into effect the true intent [interest] of the parties, so far as such intent can be collected from the whole instrument, and so far as such intent is consistent with the rules of law." While the *Merrill* opinion suggests that that statute creates some "peculiar" rule of law, in fact it merely codifies what has always been the common-law

rule in both this jurisdiction and in others as well. See, *Krause v. Krause*, *supra*; *Grant v. Hover*, *supra*; *Herter v. Herter*, 97 Neb. 260, 149 N.W. 795 (1914); *Keck v. McKinstry*, 206 Iowa 1121, 221 N.W. 851 (1928); *Thurber v. Battey*, 105 Mich. 718, 63 N.W. 995 (1895); *In re Moran's Will*, 118 Wis. 177, 96 N.W. 367 (1903).

The most important aspect of both the statute and the common law was seemingly ignored by the court in *Merrill v. Pardun*, 125 Neb. 701, 251 N.W.2d 834 (1933). Both the statute, § 76-205, and the common law provide that in attempting to ascertain the true intent of the testator you cannot ignore the rules of law applicable to a situation. A testator may intend to violate the rule against perpetuities in his will. The statute, nevertheless, cannot permit such action even if the testator's intent to that effect is absolute and clear.

In *Andrews v. Hall*, 156 Neb. 817, 819-21, 58 N.W.2d 201, 202-03 (1953), we said: "The intent of the testator is clear in the present case. He gave a life estate to his widow and the remainder in fee simple to his children, share and share alike. It is clear, also, that testator intended to restrict the alienation of the vested remainders he had devised to his children. The question is whether or not his plainly expressed intent against alienation can properly be given effect under controlling rules of law.

". . . We reiterate, however, that this intent statute does not have the effect of changing substantive law and is, in fact, declaratory of a rule of construction long adopted by the courts. We have held that it relates only to rules of construction and does not enlarge or limit, or in any way modify, any rule of substantive law that existed at the time of its passage or that thereafter has been created. Stuehm v. Mikulski, 139 Neb. 374, 297 N.W. 595, 137 A.L.R. 327; Majerus v. Santo, 143 Neb. 774, 10 N.W.2d 608. . . .

"The children of the testator were devised a fee simple title to the remainder. It was alienable and devisable by the remaindermen, unless the restriction

in question prevents. The will of the testator was effective at the death of the testator and it devised the entire interest of the testator to his wife and children. It is the general rule that a grant or devise of real estate to a designated person in fee simple, with provisions therein that are inconsistent or repugnant thereto such as a restriction against the power to sell, mortgage, or otherwise encumber, conveys an absolute fee and such restrictions are void. Watson v. Dalton, on rehearing, 146 Neb. 86, 20 N.W.2d 610; State Bank of Jansen v. Thiessen, 137 Neb. 426, 289 N.W. 791. One of the primary incidents of ownership of property in fee simple is the right to convey or encumber it. It is the general rule that a testator may not create a fee simple estate to vest at his death and at the same time restrict alienation thereof. Restatement, Property, § 406, subd. e, p. 2397.

. . . .

"We do not say that a testator may not create a vested fee simple estate subject to a condition subsequent, or a determinable or defeasible fee. What we do say is that a restriction against alienation of a vested fee simple estate is not any one of these, nor, since it is void, can it be used as the sole basis for the creation of any of these estates. A restraint on alienation in the form of a condition subsequent, forfeiting or terminating the fee simple estate, or providing for a limitation over upon breach of the condition, is void. 41 Am. Jur., Perpetuities and Restraints on Alienation, § 70, p. 111; 31 C.J.S., Estates, § 8, p. 20. The right of alienation is inherent in the vested fee simple estate and it arises by virtue of the fact that such an estate is created." See, also, *State Bank of Jansen v. Thiessen*, 137 Neb. 426, 289 N.W. 791 (1940).

In the instant case it is not possible to reconcile the devise given by Oscar Wurtele to his wife, on the one hand, and the expression of desire concerning his foster daughter, on the other.

The grant to Mary Viola Wurtele was clear and

unambiguous. She was to have the property to "be her property absolutely with full power in her to make such disposition of said property as she may desire." That intent is clear. By having the property as hers "absolutely" and with "full power" to "dispose" of the property as she may desire, she had not only the right to sell or give away the property during her lifetime but the right to will the property upon her death as well. Anything less would not have granted her the property "absolutely" with "full power in her to make such disposition" as she desired. The authority given was not limited to sale or disposition during her lifetime, but rather was to be *absolute.*

The definition of absolute is "3: marked by freedom from restraint or control by any governing or commanding agent or instrumentality . . . 8: free from qualification . . . ." Webster's Third New International Dictionary, Unabridged (1966).

An absolute title estate or property is a fee simple estate; it is an estate without end or limitations and the largest estate a person can possibly have. See, *Long v. Kyte,* 340 S.W.2d 623 (Mo. 1960); *Middleton v. Dudding,* 183 S.W. 443 (Mo. 1916).

Yet, a life tenant cannot dispose of property by will, and the sale of the property often does not constitute a "disposition" but only a change in form. See, 51 Am. Jur. 2d *Life Tenants and Remaindermen* § 64 (1970); Annot., 27 A.L.R. 1381 (1923); Annot., 47 A.L.R.3d 1078 (1973).

No reason is given to us nor are we able to find any on our own as to why the majority rule following the common law should not be the rule in this jurisdiction. Certainly the reason suggested by the court in the *Merrill* decision, to wit, the particular nature of our statute, is not very persuasive. If the testator does not desire for the devisee to have a fee simple, it is easy enough to say so. But having once granted the devise or bequest in language which standing alone constitutes an absolute conveyance, the balance of the limitations

should be disregarded, regardless of the intent of the testator, on the basis that the intent is in conflict with the first grant. Either a devisee has received the property absolutely or the devisee has not received the property absolutely. Like honesty, morality, and pregnancy, an absolute devise cannot be qualified.

To be sure, a testator can give less than absolute grant, as was done in the case of *Annable v. Ricedorff*, 140 Neb. 93, 95, 299 N.W. 373, 375 (1941), where the testator provided his property to his wife "'to her own use and benefit forever; and it is my desire and wish that after her death, that all the property remaining'" go to his children. In such a case it can be argued that only a life estate was granted to the wife for her use and benefit during her lifetime. But where, as here, the devise is "absolute," we can reach no other conclusion but that the grant was a fee simple. As such, it is without qualification regardless of what the testator may intend.

We, therefore, now adopt the majority rule to the effect that where there is a grant, devise, or bequest to one in general terms only, expressing neither fee nor life estate, and there is a subsequent limitation over of what remains at the first taker's death, if there is also given to the first taker an unlimited and unrestricted power of absolute disposal, express or implied, the grant, devise, or bequest to the first taker is construed to pass a fee. The attempted limitation over, following a gift which is in fee with full power of disposition and alienation, is void. To the extent that our previous decision in *Merrill* and cases of similar import are to the contrary, they are overruled.

Having thus concluded that the trial court was correct in ruling that the devise and bequest by Oscar Wurtele to his wife, Mary Viola Wurtele, was as a matter of law a fee simple absolute, there remained no question of fact to be resolved and the trial court was correct in granting summary judgment. See, *McGreevy v. Bremers*, 205 Neb. 554, 288 N.W.2d 490

(1980); *Blome v. Hottell*, 200 Neb. 528, 264 N.W.2d 424 (1978); Neb. Rev. Stat. § 25-1332 (Reissue 1979). The judgment of the trial court, therefore, is affirmed.

AFFIRMED.

BOSLAUGH, J., dissenting.

We have said many times that the cardinal rule in the construction of wills is to ascertain the intention of the testator. Since 1866, by statute, it has been the duty of the courts of this state to carry into effect the true intent of the parties in the construction of any instrument creating or conveying an interest in real estate. Neb. Rev. Stat. § 76-205 (Reissue 1976). The majority opinion ignores these rules by reverting to a method of decision which defeats the intention of the testator.

In this case it is clear from the language of the will that the testator intended his wife to have the use of the property with full power of disposition *during her lifetime*, but upon her death any property remaining should go to his foster daughter and her children. In previous cases we have described the estate devised to the wife under such a will as a life estate with power of disposition. *Merrill v. Pardun*, 125 Neb. 701, 251 N.W. 834 (1933).

By giving effect to only a part of the language of the will, the majority opinion declares the will devised an estate in fee simple to the wife. By this process of magic words and bootstrapping, the remaining language of the devise is declared to be of no legal effect.

I respectfully dissent.

CLINTON, J., joins in this dissent.

DIANE HAASE, APPELLEE, V.
VIRGILEE HAASE, APPELLANT.

314 N.W.2d 270

Filed January 8, 1982. No. 43632.

Property Division. The rules for determining a division of property in a dissolution provide no mathematical formula by which awards can be precisely determined, and ordinarily the court will consider all pertinent facts in reaching a just and equitable settlement.

Appeal from the District Court for Butler County: BRYCE BARTU, Judge. Affirmed as modified.

Miles W. Johnston, Jr., of Johnston, Barber & Wherry for appellant.

Blevens, Blevens & Jacobs for appellee.

Heard before BOSLAUGH, MCCOWN, CLINTON, and BRODKEY, JJ., and STANLEY, District Judge.

STANLEY, District Judge.

Virgilee Haase has appealed from an order of the District Court of Butler County, Nebraska, dissolving the marriage and ordering certain personal property sold to satisfy debts, with the net proceeds to be divided between the parties. We affirm as modified.

Appellant assigns as error the inclusion in the order of sale certain motor vehicles he brought into the marriage and furniture given the parties by his parents subject to indebtedness by the parents.

Personal property and debts were the only issues. The trial court found that the evidence of value and preference was insufficient to divide the personal property and assignments of debts, and gave the parties 30 days to enter into an agreement with respect to the personal property and debts, reserving to each of the parties their clothing and personal effects. The record details, by affidavit, all of the personal property of the parties. In lieu of a settlement agreement a referee was appointed to sell all property owned by the parties within 90 days

of the date of the decree. After deductions for expenses of the sale, court costs, and current debts of the parties, the net proceeds were to be divided equally between the parties. The parties did not reach agreement and appeal was perfected with a supersedeas bond of $5,000 posted.

The parties were married September 1, 1979, and no children were born to the marriage. The wife filed for dissolution on December 5, 1979. During the marriage both parties were employed, with the wife earning $3.75 per hour and the husband with an earning capacity of approximately $7 per hour; however, he was laid off work at the time of trial. Appellee testified that, while they were married for 3 months, they had lived together for a year to a year and a half. During this period of time appellee was primarily responsible for the support of both parties, including rent, food, and clothing.

In a proceeding for dissolution of marriage the distribution of property rests in the sound discretion of the trial court. *Phillips v. Phillips*, 200 Neb. 253, 263 N.W. 2d 447 (1978). The rules for determining a division of property in a dissolution provide no mathematical formula by which awards can be precisely determined, and ordinarily the court will consider all pertinent facts in reaching a just and equitable settlement. *Matlock v. Matlock*, 205 Neb. 357, 287 N.W.2d 690 (1980); *Rinderknecht v. Rinderknecht*, 204 Neb. 648, 284 N.W.2d 569 (1979). As we noted in *Redmond v. Redmond*, 209 Neb. 745, 311 N.W.2d 517 (1981), the trial court's decision requiring a sale of all personal property can be understood, but we are of the view that, given the nature of the personal property and the encumbrances, the portion of the decree appointing a referee to sell the personal property should be modified to require the referee to itemize the values and determine the encumbrances and report them to the court for further order.

Accordingly, as in *Redmond*, the decree is affirmed

in all respects, except that the portion thereof appointing the referee is modified to provide that the referee shall inquire into the nature and values of the various items of personal property and the encumbrances thereon and report the same to the court for further order, which, so far as is practicable, shall divide the property in kind.

AFFIRMED AS MODIFIED.

AUGUSTINE RHODES, APPELLEE AND CROSS-APPELLANT, V. PAUL EVERETT RHODES, APPELLANT AND CROSS-APPELLEE.

314 N.W.2d 271

Filed January 8, 1982. No. 43741.

1. **Property Division.** In an action for dissolution of marriage, a court may divide property between the parties in accordance with the equities of the situation, irrespective of how legal title is held.
2. ____. A division of property must take into consideration the circumstances of the parties, the duration of the marriage, contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities.
3. **Contempt.** A party to an action who fails to obey an order of the court, made for the benefit of the opposing party, is, ordinarily, guilty of a mere civil contempt.
4. ____. Where a civil contempt is charged, it may be by an affidavit by the party to the action who is injuriously affected. Procedure may be in the original action and need not be by information in the name of the state.

Appeal from the District Court for Morrill County: ROBERT O. HIPPE and ALFRED J. KORTUM, Judges. Affirmed.

Paul Rhodes, pro se.

George Gus Rhodes for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

PER CURIAM.

This is an appeal in a proceeding for the dissolution of a marriage. The trial court dissolved the marriage and divided the property of the parties. The respondent has appealed. His 53 assignments of error relate principally to the division of property which was made and to two interlocutory orders finding the respondent to be in contempt.

The parties were married in 1951. They have three children, all of whom are of age. At the time of the marriage the respondent was a lawyer practicing in Morrill County, Nebraska. The petitioner was the county superintendent of schools for Morrill County.

At the time of the marriage the respondent had a law office and some livestock and farm machinery. He owned a residence and a quarter section of land, both of which were mortgaged. The petitioner owned some home furnishings, a new automobile, an 80-acre tract of land, and had $10,000 in savings. During the course of the marriage the parties accumulated other property, including farmland and residential rental property. During the marriage the petitioner inherited approximately $50,000 from her parents and received approximately $2,500 from the teachers' retirement fund.

The trial court found, and the record shows, that until about 1960 the parties jointly operated, managed, and contributed funds to the family farming operation. In 1959 the respondent became involved in personal litigation and devoted most of his time to his private legal affairs. He was incarcerated in the Nebraska Penal Complex in 1961 and 1962 and disbarred in 1964.

After 1960 the petitioner assumed control and management of the farming operation and operated it with the assistance of the children and hired help and with no substantial financial contribution or assistance from the respondent. She also was responsible for all the domestic activities of the household, including the care of the children.

After 1960 the petitioner assumed sole responsibility

for the money borrowed to carry on the farming operation and reimbursed the respondent for cattle which he purchased. She assumed the responsibility for the maintenance and upkeep of three residential rental properties the parties had acquired, and the responsibility for the day-to-day financial management, including paying the hired help, keeping financial records of the farming operations and the rental property, and paying the debts of the parties.

The trial court found, and the record shows, that shares of stock, most of which had been purchased with funds the petitioner had received from her parents or the teachers' retirement fund, were not marital property. These securities and 13 U.S. savings bonds which the petitioner had received from her mother were awarded to the petitioner.

A 320-acre tract of land, known as the "home place," and a 960-acre tract, known as the "Dugger place," were awarded to the petitioner subject to the mortgage in the amount of $2,380 on the home place. The trial court found that the value of each tract was $200,000. The petitioner was awarded personal property having a value of approximately $64,000 as found by the trial court.

The home place consisted of the 160-acre tract owned by the respondent at the time of the marriage, the 80-acre tract owned by the petitioner at the time of the marriage, and an 80-acre tract the petitioner purchased from her brother. The respondent had but little equity in the 160-acre tract which had been purchased at a tax sale and was mortgaged. The record shows the petitioner made substantial contributions to the mortgage payments and the improvement of the land and buildings on the home place. The Dugger place was purchased during the marriage.

The respondent was awarded the residential rental property in Bridgeport, Nebraska, and the building in which he maintained his office. The real estate awarded to the respondent was valued at $70,000 by the trial

court. The respondent was awarded 1,000 shares of stock and other personal property consisting of cash, silver, automobiles, household and office furniture, law books, and miscellaneous items having a total value of approximately $66,600 as found by the trial court.

The petitioner was ordered to pay the respondent $50,000 on July 31, 1981, as a part of the property division. The petitioner was allowed an attorney fee of $5,000 to be paid by the respondent.

The property division made by the trial court resulted in the petitioner receiving approximately two-thirds of the marital property and the respondent one-third.

The respondent produced deeds which purported to show that the petitioner had conveyed all of her interest in the land to him. The petitioner denied executing the deeds, and the trial court found them to be of no force and effect. In an action for dissolution of marriage, a court may divide property between the parties in accordance with the equities of the situation, irrespective of how legal title is held. *Cozette v. Cozette*, 196 Neb. 780, 784, 246 N.W.2d 473 (1976).

A division of property must take into consideration the circumstances of the parties, the duration of the marriage, contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities. *Chrisp v. Chrisp*, 207 Neb. 348, 299 N.W.2d 162 (1980).

The record is replete with evidence that, for nearly 20 years, the petitioner was responsible for the maintenance and improvement of these parcels of land; that the petitioner, the children, and the hired help, who were paid by the petitioner, did the actual farmwork, in many cases despite the tender ages of the children and despite the poor health of the petitioner; that, in addition, they farmed property titled in the names of the respondent's parents; that the petitioner maintained the residential rental units in Bridgeport; that during this time she was almost solely responsible for the care

of the three children; and that she interrupted her personal professional career to care for the children and carry on the farming operations.

The circumstances of the parties and the contributions to the marriage made by each party justify the division of property which was made in this case.

By cross-appeal, the petitioner contends that the share of the property awarded to the respondent was excessive. For the reasons previously stated, we believe the division of property between the parties was fair and equitable and should be affirmed.

The remaining issues relate to the orders finding the respondent to be in contempt.

The first contempt consisted of the recording of a deed after the respondent had been specifically ordered by the court not to do so. The second contempt consisted of the violation of an order to not disturb the peace of the petitioner.

As to the second contempt, the respondent contends he was not notified of the charges against him nor given an opportunity to defend because no formal accusation was filed.

A party to an action who fails to obey an order of the court, made for the benefit of the opposing party, is, ordinarily, guilty of a mere civil contempt. *McFarland v. State*, 165 Neb. 487, 86 N.W.2d 182 (1957).

In *Eliker v. Eliker*, 206 Neb. 764, 770, 295 N.W.2d 268, 272 (1980), we said: " 'Where a civil contempt is charged, it may be by an affidavit by the party to the action who is injuriously affected. Procedure may be in the original action and need not be by information in the name of the state.' "

The petitioner's motion for citation clearly stated the charges against the respondent and was sufficient to advise the respondent of the contempt charges against him. The record demonstrates that the respondent had an adequate opportunity to defend himself against the charges.

The judgment of the District Court is affirmed. The

petitioner is allowed the sum of $2,500 for the services of her attorney in this court.

AFFIRMED.

STANLEY R. NEIL, APPELLEE, V. HARRY "PETE" PETERSON, DIRECTOR, DEPARTMENT OF MOTOR VEHICLES, STATE OF NEBRASKA, APPELLANT.

314 N.W.2d 275

Filed January 8, 1982. No. 44277.

Administrative Law: Criminal Law. Acquittal or conviction on a criminal charge is not a bar to a civil action by the government, remedial in nature, arising out of the same facts on which the criminal proceeding was based.

Appeal from the District Court for York County: BRYCE BARTU, Judge. Reversed and remanded with directions to reinstate the order of the director.

Paul L. Douglas, Attorney General, and Ruth Anne E. Galter for appellant.

No appearance for appellee.

Submitted without oral argument. KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

PER CURIAM.

This is an appeal by the director of the Department of Motor Vehicles from an order of the District Court for York County reversing an order of the director made under the provisions of Neb. Rev. Stat. §§ 39-669.14 to 39-669.17 (Reissue 1978) revoking the motor vehicle operator's license of the appellee Neil for refusal to give a urine or blood sample for testing, contrary to the provisions of Neb. Rev. Stat. § 39-669.08(4) (Reissue 1978). On the appeal to the District Court from the order of the director revoking Neil's license for a

period of 6 months, there was received in evidence the record made before the director. This evidence showed prima facie the violation of § 39-669.08(4) by Neil, proof of notification to Neil, and the order of the director setting forth his findings and the order of revocation.

Also received in the District Court were records showing that Neil had been charged in the county court with operating a motor vehicle while under the influence of intoxicating liquor, refusal to take a preliminary breath test, and refusal to submit to a chemical test of blood or urine. These charges all relate to the same incident upon the basis of which the operator's license was revoked by the director. The record shows that the defendant pled guilty to the driving while intoxicated charge, that the other two charges were dismissed by the county court, that he was placed on probation, and that the order of probation limited his rights to operate a motor vehicle.

The District Court reversed the director's order of revocation for the reason that the revocation allegedly constituted double jeopardy because the prosecution for refusal to submit to the test had been dismissed by the county court. The District Court relies upon *State v. Knoles*, 199 Neb. 211, 256 N.W.2d 873 (1977).

The ruling and order of the District Court was erroneous. The order of the District Court is reversed and the order of the director reinstated.

The same motor vehicle operation may give rise to two separate and distinct proceedings. One is a civil and administrative licensing procedure instituted by the Director of Motor Vehicles to determine whether a person's privilege to drive is revoked. The other is a criminal action instituted in the appropriate court to determine whether a crime has been committed. Each action proceeds independently of the other and the outcome of one action is of no consequence to the other. *Ziemba v. Johns*, 183 Neb. 644, 163 N.W.2d 780 (1968). Acquittal on a criminal charge is not a bar to a civil action by the government, remedial in nature, arising

out of the same facts on which the criminal proceeding was based. *Helvering v. Mitchell*, 303 U.S. 391, 58 S. Ct. 630, 82 L. Ed. 917 (1938); *Atkinson v. Parsekian*, 37 N.J. 143, 179 A.2d 732 (1962). See, also, *State v. Amick*, 173 Neb. 770, 114 N.W.2d 893 (1962). The case of *State v. Knoles, supra*, is patently not applicable.

REVERSED AND REMANDED WITH DIRECTIONS TO REINSTATE THE ORDER OF THE DIRECTOR.

PATTI S. HAEN, APPELLEE, V.
R. RICHARD HAEN, APPELLANT.

314 N.W.2d 276

Filed January 8, 1982. No. 81-620.

Judgments. An irregular judgment is one which is rendered contrary to the course of law and the practice of the courts.

Appeal from the District Court for Nemaha County: RONALD E. REAGAN, Judge. Affirmed.

Jefferson G. Broady for appellant.

Hoch & Steinheider for appellee.

Submitted without oral argument. KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

PER CURIAM.

A decree of divorce between the parties to this suit was entered on the 31st of December 1980. On May 4, 1981, after the term of court had expired, appellant filed a motion to set aside the decree, alleging that the judgment was irregularly obtained by reason of the fact "[t]hat the petitioner was not a resident of the State of Nebraska for one (1) year next to the filing of this petition the 9th day of June, 1980; rather abandoned her residence in Nebraska on the 16th day of January, 1980

and did not return to the State of Nebraska until the 12th day of May, 1980."

In her petition the appellee alleged that she was a resident of the State of Nebraska and that the court had jurisdiction of the parties. The appellant, contrary to the position addressed to the court in his motion, alleged in his answer: "Admits that petitioner has been a resident of Nebraska for more than one year and that petitioner's present address is Auburn Trailer Court, Lot 10, Auburn, Nebraska." In his cross-petition appellant alleged "[t]hat he resides at Auburn, Nemaha County, Nebraska, and he has been a resident of the State of Nebraska for more than one year."

The residence of the parties was not an issue before the trial court. On the presentation of the motion to the trial judge, the trial court found that the judgment was not irregularly obtained but, rather, the motion raised issues of fraud in the obtaining of the judgment by the appellant and appellee, either severally or jointly. The trial judge also noted that Neb. Rev. Stat. § 25-2002 (Reissue 1979) provides in part: "The proceedings to vacate or modify the judgment or order on the grounds mentioned in section 25-2001, subdivisions (4), . . . shall be by petition verified by affidavit, setting forth the judgment or order, the grounds to vacate or modify it, and the defense to the action, if the party applying was defendant. . . ." The trial judge, in finding fraud, held that the court was without jurisdiction to entertain the motion to set aside the decree since a separate petition had not been filed. We affirm.

There is only one issue in this case and that is whether or not a judgment in a divorce case, in which the parties do not contest the fact of residency, is obtained irregularly when the fact of residency for the statutory period necessary to obtain a decree of divorce is alleged to be otherwise than that maintained by the parties in their pleadings. Black's Law Dictionary 744 (5th ed. 1979) defines irregular judgment as one rendered contrary to the course of law and practice of the court. *Estate of*

McKenna v. McCormick, 60 Neb. 595, 83 N.W. 844 (1900); *Petersen v. Dethlefs*, 139 Neb. 572, 298 N.W. 155 (1941); *Paine v. United States Nat. Bank of Omaha*, 199 Neb. 248, 257 N.W.2d 826 (1977). Further, in defining irregularity, Black states at 744: "The doing or not doing that, in the conduct of a suit at law, which, conformably *with the practice of the court, ought or ought not to be done. . . .*" (Emphasis supplied.) The term is not synonymous with illegality. There are no allegations that the procedure followed by the District Court was not in conformity with the laws of this state or with the practices of the court. Indeed, the contrary appears. We hold that there was no irregularity in the obtaining of the judgment. The trial court was correct in denying the motion since the appellant was without power on motion to set aside the decree.

AFFIRMED.

MID-SOUTH ORDER BUYERS, INC., A CORPORATION, APPELLEE, V. PLATTE VALLEY LIVESTOCK, INC., A CORPORATION, APPELLANT.

315 N.W.2d 229

Filed January 22, 1982. No. 43600.

1. **Federal Acts: Livestock: Words and Phrases.** The terms practice and practices in 7 U.S.C. § 208(a) (1976) do not necessarily require repetitious acts. The term practice may involve only a single transaction if the unjust or unreasonable practice is among the evils the Packers and Stockyards Act was intended to remedy.
2. **Federal Acts: Livestock: Trusts.** A trustee may not offset against the trust account a debt owing to the trustee individually and not as trustee. Under the regulations issued by the Secretary of Agriculture under 7 U.S.C. § 228 (1976), the custodial account of a market agency is a trust fund of which the marketing agency is a trustee. The misuse of a custodial account by a marketing agency is an unjust practice under the provisions of 7 U.S.C. § 208(a) (1976), and the marketing agency may be liable under the provisions of 7 U.S.C. § 209(a) (1976) to the person injured by such misuse.

3. **Federal Acts: Reparation Orders: Jurisdiction.** An order of the Secretary of Agriculture for the payment of money may be enforced in any U.S. District Court or in any state court having general jurisdiction of the parties. The findings and orders of the Secretary are prima facie evidence of the facts therein stated. 7 U.S.C. § 210(f) (1976).
4. **Federal Acts: Reparation Orders: Summary Judgments.** Where a reparation order of the Secretary of Agriculture contains findings on all matters necessary to the plaintiff's recovery and is supported by substantial evidence and no rebutting evidence is offered, the cause may be decided on motion for summary judgment in the court having jurisdiction.

Appeal from the District Court for Scotts Bluff County: ALFRED J. KORTUM, Judge. Affirmed.

Leo A. Knowles of McGrath, North, O'Malley & Kratz, P.C., for appellant.

Frank J. Mattoon of Martin, Mattoon, Matzke & Mattoon for appellee.

William G. Kanter, James Michael Kelly, and Raymond W. Fullerton; and Irene M. Solet, John J. Casey, and Helen C. Harris, amicus curiae.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and HASTINGS, JJ.

CLINTON, J.

This is an action commenced in the District Court for Scotts Bluff County, Nebraska, by plaintiff, Mid-South Order Buyers, Inc. (Mid-South), against the defendant, Platte Valley Livestock, Inc. (Platte Valley), under the provisions of the Packers and Stockyards Act, 7 U.S.C. §§ 208 et seq. (1976), to enforce, under the provisions of § 210(f), a reparation order for the payment of money made by the Secretary of Agriculture through his delegate.

Mid-South, as its name implies, was engaged in the business, among others, of buying cattle for others on order for a commission and is a registrant under the act. Platte Valley is a dealer and market agency under the terms of the act, registered as such with the Secretary of Agriculture. It is engaged in the business of

buying and selling cattle on commission and on its own account.

The cause in the District Court was tried on motions for summary judgment filed by both Mid-South and Platte Valley. The evidence in support of the motions was the order and findings of the hearing examiner of the Department of Agriculture (the Secretary's delegate) and the record made in the hearing before the examiner, together with the foundational exhibits. The order of the examiner directed Platte Valley to pay Mid-South the sum of $26,156.04 with interest at 8 percent from April 1, 1973, until paid. The District Court denied the motion of Platte Valley, granted that of Mid-South, and entered judgment for Mid-South in the amount specified in the order of the examiner. Platte Valley has appealed to this court and raises the following issues: (1) The U.S. Department of Agriculture was without jurisdiction over this matter inasmuch as the action of Platte Valley on which the reparation order is based did not constitute a "practice" within the meaning of the Packers and Stockyards Act, § 208. (2) Irrespective of the jurisdiction of the Secretary of Agriculture over this dispute, the actions of Platte Valley were clearly lawful and do not, in any event, amount to an unlawful, unreasonable, or discriminatory practice, and such holding was contrary to law and unsupported by substantial evidence.

An understanding of the issues makes necessary a summary of the pertinent federal statutes and regulations as well as a summary of the facts as found by the hearing examiner.

We will first summarize the statutes and the regulations. Section 208(a) places the duty upon stockyard owners and market agencies to "establish, observe, and enforce just, reasonable, and nondiscriminatory regulations and practices in respect to the furnishing of stockyard services, and every unjust, unreasonable, or discriminatory regulation or practice is prohibited and declared to be unlawful." Section 209(a) makes any

person violating any provision of the chapter (act) liable to the person injured thereby for the full amount of damages sustained as a consequence of the violation. Liability under the act may be enforced by complaint to the Secretary of Agriculture as provided in § 210. An order of the Secretary for the payment of money may be enforced in any U.S. District Court or in any state court having general jurisdiction of the parties. The findings and orders of the Secretary are prima facie evidence of the facts therein stated. § 210(f).

Section 228(a) authorizes the Secretary to make rules and regulations to carry out the purposes of the act. Regulations adopted by the Secretary require a market agency to maintain a separate bank account designated as "custodial account for shippers' proceeds," or some similar designation, and make the depositor or market agency a fiduciary, and designate funds in the account as trust funds.

In the reparation proceedings before the examiner, there were parties other than Mid-South and Platte Valley. They are not parties to this appeal because of an intervening bankruptcy. However, they must be identified for purposes of setting forth the factual summary. These parties were Tige Enterprises, Inc. (Tige), and its president and sole stockholder, Gary Berta.

A brief summary of the facts taken from the findings and order and the accompanying record is as follows. On February 2, 7, and 9, 1973, Tige, through Berta, purchased from Mid-South three separate lots of cattle numbering, respectively, 118, 107, and 104 head. The invoices on these purchases, which were separately shipped on the dates above mentioned, provided: "Customers paying for livestock purchased of or through this company by check or draft agree that title does not pass until the funds have actually been received by this company." The motor truck bills of lading consigned the cattle to Tige Enterprises, Inc., in care of Gary Berta, at Platte Valley Livestock, Gering, Nebraska.

When the cattle from the first and second shipments

were delivered at Platte Valley, the cattle were under stress and not fit for sale. The weather was bad, and the yards were wet and muddy. The matter was discussed by Berta and Floyd Engleman, president and sole stockholder of Platte Valley. Engleman suggested that the stressed cattle be placed in pasture on feed and medication, and furnished to Berta some pastureland which he had available. Twenty cattle from the first shipment and all the cattle from the second shipment, except a few that had died, were placed in the pasture along with other cattle which were in similar condition.

When the second load of cattle was shipped from Mid-South's place of business in Mississippi, Mid-South had not received payment for the first shipment. It contacted Berta who indicated the check was in the mail. When the third load arrived at Platte Valley, no payment had been made for any of the cattle shipped.

On February 27, 1973, the approximately 129 head of cattle which had been placed in pasture along with the others, 333 head in all, were sold at Platte Valley by Platte Valley as agent for Tige. At that time Tige and/or Berta was indebted to Platte Valley in the amount of approximately $62,000 on unrelated cattle transactions because of unpaid drafts drawn on Tige. The net proceeds of the February 27th sale, approximately $63,000, were deposited in Platte Valley's custodial account.

On the evening of February 27, 1973, an employee of Mid-South spoke by telephone to Engleman, president of Platte Valley, and made inquiry concerning Tige, informing Engleman that Mid-South had not been paid for the cattle shipped. This conversation spanned approximately 45 minutes.

On February 28, 1973, Platte Valley delivered its check in the amount of $38,483.40 drawn on its custodial account to a bank to which it was indebted because of Tige's unpaid drafts. Tige was named as a payee on the check drawn on the custodial account but did not endorse it.

On March 1, 1973, Platte Valley deposited in its general account a check in the amount of $23,894.77 drawn on its custodial account. Tige was named as a payee on this check but did not endorse it. Later Engleman informed Berta that he need not worry anymore because Tige was no longer indebted to Platte Valley. It is Platte Valley's use of the custodial account to pay itself money owed by Tige on other transactions after it had notice of Mid-South's interest in the cattle which is alleged to constitute the unjust, unreasonable practice declared unlawful by the act.

The essence of Platte Valley's contention in the first issue is that the Secretary of Agriculture had no jurisdiction to enter the order because the transaction was not a "practice" within the meaning of § 208(a), and further urged that the term "ordinarily implies uniformity and continuity, and does not denote a few isolated acts, and uniformity and universality, general notoriety and acquiescence, must characterize the actions on which a practice is predicated." *Guenther v. Morehead*, 272 F. Supp. 721, 726 (S.D. Iowa 1967). It also relies upon various other federal trial court opinions, including *McClure v. E. A. Blackshere Company*, 231 F. Supp. 678 (D. Md. 1964); *Arnold Livestock Sales Company, Inc. v. Pearson*, 383 F. Supp. 1319 (D. Neb. 1974); and the following appellate court opinions, *Hays Livestk. Com'n Co., Inc. v. Maly Livestk. Com'n Co., Inc.*, 498 F.2d 925 (10th Cir. 1974); *Rice v. Wilcox*, 630 F.2d 586 (8th Cir. 1980). In sum, Platte Valley contends the term "practice" is restricted to repetitive acts by the particular individual or company against whom complaint is made.

To support the contrary position, Mid-South also relies upon *Hays Livestk. Com'n Co., Inc. v. Maly Livestk. Com'n Co., Inc., supra*, and, in addition, the federal trial court decision in *Neugebauer v. Ryken*, 34 A.D. 1712 (S.D. S.D. 1975). In this latter case the court, relying upon legislative history of the act, said: "It would defeat the purpose of the Act to hold that the Secretary was devoid of jurisdiction in the instant case

merely because the defendant has not made misrepresentations to the plaintiff or to other purchasers in the past." 34 A.D. at 1716. Mid-South in effect argues that "practice" means acts which may occur within the industry and does not require repetitive action by the individual or company against whom complaint is made.

The Secretary of Agriculture has filed a brief amicus curiae for the purpose of defending the jurisdiction of the Secretary in this case. The Secretary cites and relies upon *Hays Livestk. Com'n Co., Inc. v. Maly Livestk. Com'n Co., Inc., supra; Rice v. Wilcox, supra;* and *Neugebauer v. Ryken, supra,* as well as *United States v. Donahue Bros.*, 59 F.2d 1019 (8th Cir. 1932); *Wickard v. Filburn*, 317 U.S. 111, 63 S. Ct. 82, 87 L. Ed. 122 (1942); and 61 Cong. Rec. 1800, 1801, 1887, 2664, 8310 (1921).

We affirm the judgment of the District Court for reasons hereinafter set forth. In so doing, we will discuss the authorities cited by the parties and by amicus. However, because of the seeming split of authority and the diversity of reasoning within the splits, we think it advisable to begin our analysis with the statutory language itself and the aid of the dictionary.

Most words, including the word "practice," encompass more than one meaning, and the particular meaning intended must be determined from the context in which it is employed. Only two of the multiple meanings of the word practice, as found in the dictionary, can possibly apply in the context of the statute. In Webster's Third New International Dictionary, Unabridged (1968), one meaning is "to make use of: use, employ." Another meaning is "to do something habitually," or "repeated or customary action."

The words of the statute, "and *every* unjust, unreasonable, or discriminatory regulation or practice is prohibited and declared to be unlawful," § 208(a), do not suggest that the word practice includes only that which is done habitually or repetitively by the

particular stockyard or marketing agency. (Emphasis supplied.) Rather, as we will later attempt to demonstrate from an analysis of the cases upon which the parties rely, repetition may be important only in determining whether a particular act is an unjust or unreasonable practice included within the evils which the act was intended to cure.

We look first at the Circuit Court of Appeals opinions. *Hays Livestk. Com'n Co., Inc. v. Maly Livestk. Com'n Co., Inc.*, 498 F.2d 925 (10th Cir. 1974), involved consolidated appeals of three separate cases founded upon reparation orders entered by the Secretary against Maly, a marketing agent, and one Wenzl, a registered and bonded livestock dealer. The facts were that Wenzl purchased livestock from the plaintiffs by drawing drafts on Maly which then sold the cattle on commission. Wenzl had drawn drafts on Maly for about a year before four drafts related to the cattle transactions were dishonored. Maly then applied the proceeds of the sale of cattle to Wenzl's unpaid account with it. Maly's evidence indicated that it had agreed to honor Wenzl's drafts only so long as Wenzl had cattle in Maly's yard to cover the drafts. In each of the cases, Maly had previously honored Wenzl's drafts payable to the three plaintiffs. Among other things the court, in its opinion, noted the Secretary had found it was an unjust and unreasonable practice for Maly to retain the proceeds from the resale of the livestock, knowing the shippers of the livestock had not been paid. We note that in none of these cases had there been a prior rejection of drafts. The court in *Maly* said: "The relevant case law is both controversial and helpful. In Capitol Packing Company v. United States, 350 F.2d 67 (10th Cir. 1965), a case in which we directly reviewed § 213(a) cease and desist orders, we noted the absence of any statutory definition of the critical phrase 'unfair, unjustly discriminatory or deceptive practice'; that its meaning 'must be determined by the facts of each case within the purposes of the Packers and Stockyards Act,' (at 76); and that 'the

responsibility for efficient regulation of market agencies and packers lies with the Secretary of Agriculture . . . . The proper scope of judicial review is limited to the correction of errors of law and to examination of the sufficiency of the evidence supporting the factual conclusions.'" *Maly* at 930. The court also said: "Federal courts have been at pains to point out that the Packers and Stockyards Act did not make of the Secretary a collecting agency. More specifically, the Act was not designed to provide a remedy for every worthless check or dishonored draft. Adams v. Greeson, 300 F.2d 555 (10th Cir. 1962); Guenther v. Morehead, 272 F. Supp. 721 (S.D. Iowa 1967); Lewis v. Goldsborough, 234 F. Supp. 524 (E.D. Ark., W.D. 1964); McClure v. E. A. Blackshere Company, 231 F. Supp. 678 (D. Md. 1964)." *Maly* at 930-31. The court further said: "Relying upon the reasoning in Capitol, Adams, Mahon, and the district court cases, Maly contends that its dishonoring of four drafts in three separate and distinct cases was not a 'practice' prohibited by § 208 of the Act." *Maly* at 931. The court, then noting the case before it, turned on the issue of "an unjust and unreasonable practice by a marketing agency," and said: "Finally, the cited district court cases are distinguishable since we find much more involved in our case than a few 'isolated acts.' In any event, to the extent that the district court cases are not factually distinguishable, we respectfully decline to follow them." *Maly* at 931. The court declined to rely upon a theory of estoppel, i.e., the honoring of prior drafts, and again said: "The Secretary also held, however, that it was unjust and unreasonable for Maly to retain the proceeds from the resale of livestock with knowledge that the shippers of the livestock had not been paid." *Maly* at 932.

We cannot interpret the above case to stand for the proposition that the term practice covers only repeated, habitual, or customary acts. Rather, it merely defines a kind of act which is unjust within the meaning of the statute.

The case of *Rice v. Wilcox*, 630 F.2d 586 (8th Cir. 1980), is in many respects similar to *Maly*. We quote at 588: "Bill Davis, d/b/a Davis Livestock Auction (Davis), was both a market agency selling livestock on commission and a dealer buying and selling livestock for his own account operating on a posted stockyard. Davis was found to have violated 7 U.S.C. § 208 by committing the unjust practice of retaining the proceeds from the sale of cattle owned by Bill and Lois Rice and consigned to him by Wilcox.

"The Secretary of Agriculture found Clenis Wilcox to be operating as a dealer and his failure to pay Rice for livestock purchased was also found to be an unjust practice. Thereafter, the reparation orders were entered, which are the basis for this appeal. We affirm the action of the district court sustaining the reparation orders."

The court, making reference to the "dispute" surrounding the definition of the term "practice," noted that an isolated instance does not constitute a practice, and then said: "In the instant case, after honoring seventeen drafts, two drafts were dishonored. As in *Hays*, there was sufficient recurrence to establish a 'practice.' In so holding we emphasize that isolated transactions do not constitute a practice." *Rice* at 591. The court then concluded by referring to an earlier-mentioned district court opinion, *Neugebauer v. Ryken*, 34 A.D. 1712 (S.D. S.D. 1975), and said: "We agree with Chief Judge Nichol that the purposes of the Act are not served by interpreting the term 'practice' to require several acts of dishonoring checks." *Rice* at 592.

Admittedly, both *Maly* and *Rice* contain language which is ambiguous and when taken in isolation tends to support Platte Valley's definition of "practice." However, when we consider the facts and results in each of the cases, it is clear the repetitive element refers not to the transaction for which relief is given, but to acts preceding the transaction which make the latter unjust or unreasonable. In two of the cases considered in *Maly*

a single dishonored draft was involved. In *Rice* two drafts were dishonored at the same time.

Although *Neugebauer* is a trial court opinion, the Eighth Circuit adopted its reasoning and, therefore, it is necessary to examine *Neugebauer* in order to interpret *Rice*. *Neugebauer* did not involve drafts or checks but did involve a single transaction. In that case the stockyard advertised for sale a group of Angus heifers, representing them to have been bred to Angus bulls. The representation was false. The Secretary entered a reparation order for the payment of money. The judge in *Neugebauer* wrote at 1714-16: "The allegation of lack of jurisdiction is dependent upon the interpretation of the word 'practice' found in Sec. 208 of the Act as amended. Defendant asserts that the action of defendant was a single and isolated incident and not a 'practice' within the meaning of the Act. The United States intervened for the explicit purpose of defending the jurisdiction of the Secretary of Agriculture in this case.

"This Court is persuaded that the action of the defendant was a prohibited 'practice' within the meaning of the Act. The defendant has cited two district court cases in support of the contention that jurisdiction is lacking. McClure v. E. A. Blackshere Co., 231 F. Supp. 678 (D. Md. 1964); Guenther v. Morehead, 272 F. Supp. 721 (S.D. Iowa 1967).

"In *McClure*, the plaintiff had sought enforcement of a reparation order entered upon defendant's refusal to pay for livestock purchased by defendant's agent. The Court found that the Secretary did not have jurisdiction under Sec. 208 of the Act. The opinion was first premised on the basis that nonpayment of a bill did not involve a regulation or practice with respect to the furnishing of stockyard services. The Court stated:

"'It would take the most violent stretching of an elastic imagination to class the nonpayment of a bill as involving a regulation or practice in respect to the furnishing of stockyard services; . . . . *McClure*, *supra* at 681.'

"The transaction before this Court does not relate to nonpayment of bills or an ordinary debtor-creditor relationship. The Secretary found that defendant, a registered market agency under the Act, had made false representations in the sale of Angus heifers. The Court can conceive of no action by a market agency more inextricably within the term of 'furnishing stockyard services' than representations made by a market agency in the course of an auction sale of livestock at a posted stockyard. Under Sec. 201(b) and (c) of the Act, defendant's actions were clearly in the course of furnishing stockyard services by a registered market agency.

"The Court in *McClure* also found that a single instance of nonpayment of a bill could not be denominated a practice within the meaning of the Act. The Court noted:

"'Practice ordinarily implies uniformity and continuity, and does not denote a few isolated acts, and uniformity and universality, general notoriety and acquiescence, must characterize the actions on which a practice is predicated. *McClure*, *supra* at 682.'

"Implicit in this analysis was the restriction that there could be only a single actor to establish a practice. The Court finds no such limitation either in the language of the Act or the legislative history. . . .

. . . .

"The above references of legislative history would indicate that the term 'practices' found in Sec. 208 referred to practices within the industry as a whole and not to the practices of a single specific market agency. It would defeat the purpose of the Act to hold that the Secretary was devoid of jurisdiction in the instant case merely because the defendant has not made misrepresentations to the plaintiff or to other purchasers in the past."

We hold that the terms "practice" and "practices" in § 208(a) do not necessarily require repetitive acts. The term "practice" may involve a single transaction if the

unjust or unreasonable practice is among the evils the Packers and Stockyards Act was intended to remedy. The cases upon which Platte Valley relies are sufficiently distinguished in the cases we have just discussed, and we will not elaborate or repeat those distinctions in this opinion. Our holding should not be construed as indicating we disagree with the uniform holding of the cases we have discussed, that the reparation procedure does not give the Secretary jurisdiction as a check-collecting agency. The Secretary of Agriculture had jurisdiction in this case because the act involved was, for the reasons stated in the next section of this opinion, unjust and unreasonable.

The essence of Platte Valley's second contention is that it had the right to offset Tige's obligation to it by appropriating money it held in the custodial account for shippers' proceeds. As we have already noted, the Secretary's regulation adopted pursuant to the act makes the custodial account a trust fund of which the market agency is the trustee. One of the apparent purposes of this regulation is to prevent the market agency from using the trust account to finance its own operations. Concomitant with that purpose is the objective of assuring that the seller of the cattle is paid. *United States v. Donahue Bros.*, 59 F.2d 1019 (8th Cir. 1932).

Under the general law of trusts, a trustee may not offset a debt owing to the trustee individually and not as trustee. Bogert, The Law of Trusts and Trustees § 814 (Rev. 2d ed. 1981), and cases and authorities cited at n. 58. In *United States v. Donahue Bros.*, *supra*, the Eighth Circuit held the conversion or commingling of trust funds was an unjust practice under the act. While the conversion by Platte Valley occurred in a debtor-creditor context, there is no doubt that under the facts in the case, as found by the Secretary, and the absence of any showing that some other party had an interest in the funds Tige owed Platte Valley from prior transactions, Platte Valley, when and if it received payment from Tige, would have been entitled to those funds

individually.

It is, of course, important in this case that the record supports the Secretary's finding that when Platte Valley offset the debt of Tige on February 28 and March 1, it already had notice that Mid-South was the shipper of the cattle and was unpaid. The first fact it knew from the bills of lading; the second, from Engleman's conversation with Mid-South's agent. It therefore knew that Mid-South had an interest in Tige being paid so that it in turn could be paid.

Mid-South had, as we have already noted, reserved in the invoices title until it was paid. Tige's right in the cattle as against the seller (Mid-South) was conditioned on payment. Neb. U.C.C. § 2-507(2) (Reissue 1980). Tige could, however, transfer title to a good faith purchaser. Neb. U.C.C. § 2-403(1) (Reissue 1980). Platte Valley, however, was not a purchaser; it was an agent of Tige, selling on commission. Its rights could rise no higher than those of its principal.

Under the provisions of § 209(a), the market agency is liable for violation of the provisions of § 208(a) to the person or persons injured thereby. Mid-South was injured by the act of Platte Valley in misusing the trust account contrary to the provisions of the act and the regulations promulgated thereunder. Platte Valley's contention that the judgment is not supported by sufficient evidence is not well taken.

The exclusive method of review of reparation orders is by action in the U.S. District Court or the appropriate state court. § 210(f). *Maly Livestock Commission Co. v. Hardin*, 446 F.2d 4 (8th Cir. 1971). The standard of review by the court seems not to have been decided. However, the U.S. Supreme Court has construed provisions of the Interstate Commerce Act substantially the same as § 210(f). *ICC v. Atlantic Coast Line R. Co.*, 383 U.S. 576, 86 S. Ct. 1000, 16 L. Ed. 2d 109 (1966). The Court there held that the commission's findings on issues other than primary jurisdiction issues "are subject to review under the prima facie evidence provision

of § 16(2), with the statutory rights of introducing evidence not before the Commission and obtaining a jury determination of disputed issues of fact." *Id.* at 594. The Court continued in a footnote: "Section 16(2), of course, does not limit the carrier to introducing opposing evidence to rebut the prima facie effect of the Commission's order. It may also challenge the admissibility of the order on the grounds, for example, that the Commission did not afford the carrier a fair hearing or that the order was not based upon substantial evidence .... But if a Commission order containing findings on all matters essential to the shipper's recovery is admitted and the carrier produces no opposing evidence, the findings and order of the Commission may not be rejected by the jury and the shipper is entitled to judgment." *Id.* at 594.

The act makes the findings of the Secretary prima facie evidence of the facts found. § 210(f). There was received in evidence on the motion for summary judgment not only the order and findings of the Secretary, but the record of the entire hearing before the examiner at which both parties presented evidence without restriction. Platte Valley did not, at the hearing in the District Court, offer any additional contradictory evidence or seek a further evidentiary hearing. Under the circumstances, it was proper to determine the matter on motion for summary judgment.

AFFIRMED.

WHITE, J., participating on briefs.

A. HIRSH, INC., A PENNSYLVANIA CORPORATION, APPELLEE, V. NATIONAL HAIR COMPANY, A NEBRASKA CORPORATION, ET AL., APPELLANTS.

315 N.W.2d 236

Filed January 22, 1982. No. 43601.

1. **Courts: Judgments.** A district court has both statutory and inherent power to dismiss an action without prejudice for lack of prosecution.
2. ____:____. The power to vacate or modify a judgment during term rests in the sound discretion of the court.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Reversed and remanded with directions.

Robert M. Zuber of Zuber & Ginsburg for appellants.

Donald B. Fiedler of Fiedler & Hanna for appellee.

Heard before BOSLAUGH, MCCOWN, BRODKEY, and CLINTON, JJ., and STANLEY, District Judge.

PER CURIAM.

The defendants, National Hair Company and Midstates By-Products, have appealed from the order of the District Court of Douglas County vacating a previous order which dismissed the case for want of prosecution. There is no bill of exceptions, and the record consists of the pleadings and docket entries.

The plaintiff, A. Hirsh, Inc., filed its petition for damages in the District Court on August 2, 1972. The case remained pending for a number of years. On October 7, 1977, pursuant to the rules of the District Court, the case was placed on the default dismissal list for lack of prosecution, but was removed from the dismissal list on November 4, 1977.

On February 8, 1980, an order to show cause was entered and the case was again placed on the dismissal list as provided by Rule XII C of the District Court.

Rule XII C of the District Court of Douglas County, Nebraska, provides: "On or before August 1st of each

year the Clerk of the Court shall prepare a default dismissal list of all pending civil cases which appear to be in default or on which no action has been taken since July 1st of the preceding year. The Presiding Judge shall examine the list and in those cases in which it is deemed proper he shall enter an order to show cause why those cases should not be dismissed for want of prosecution. On or before thirty (30) days after said order is entered, a written response by any interested party must be filed in the action and a copy of the same served upon all other interested parties. A hearing shall be had thereon before a judge or judges specifically designated by the Presiding Judge for that purpose, or said action shall be deemed dismissed. Notice of said order to show cause shall be served on all interested parties by publication in The Daily Record. Counsel residing outside Douglas County shall be served by mail."

On May 2, 1980, no good cause having been shown, the case was dismissed without prejudice at costs of the plaintiff for lack of prosecution. The plaintiff then moved to vacate the order of dismissal, which motion was granted on May 21, 1980, over the objection of the defendants. The defendants' motion for new trial was overruled, and from this order the defendants have appealed.

A district court has discretionary power to dismiss a case without prejudice for want of prosecution. Neb. Rev. Stat. § 25-1149 (Reissue 1979). Also, such a dismissal is within the inherent power of the court. *Brown v. Lincoln*, 157 Neb. 840, 61 N.W.2d 836 (1954).

A district court has inherent power to vacate or modify its own judgment any time during the term in which it is rendered. *Beliveau v. Goodrich*, 185 Neb. 98, 173 N.W.2d 877 (1970); *Fanning v. Richards*, 193 Neb. 431, 227 N.W.2d 595 (1975). "[T]his is a matter that rests in the sound discretion of the [trial] court. But this discretion is not an arbitrary one. It

must be exercised reasonably and depends upon the facts and circumstances in each case as shown by the record." *Beliveau, supra* at 100, 173 N.W.2d at 879; *Morgan v. Weiner*, 173 Neb. 715, 114 N.W.2d 720 (1962). The question presented by the appeal is whether the District Court abused its discretion in granting the plaintiff's motion to vacate the order of dismissal after the 30-day time limit of Rule XII C had expired without a showing of good cause as to why the case should not be dismissed.

Since there is no bill of exceptions, we are limited to a consideration of whether the record supports the judgment of the trial court. *Lum v. Mattley*, 208 Neb. 789, 305 N.W.2d 878 (1981). The docket entries show no record activity between May 11, 1978, and February 8, 1980, when the order to show cause pursuant to Rule XII C was filed, although the plaintiff's motion filed May 16, 1980, alleged a deposition had been taken on October 23, 1979. The next record activity after February 8, 1980, appears on May 2, 1980, when the cause was dismissed for want of prosecution. The dismissal order was entered well after the time had expired in which the plaintiff was required to show cause. The record is devoid of any indication why the plaintiff's motion should have been granted some 3 months after the order to show cause was entered and nearly 3 weeks after the cause had been dismissed for want of prosecution.

On the record before us, the granting of the plaintiff's motion to vacate the order of dismissal was an abuse of discretion. The order is reversed and the cause remanded to the District Court with directions to reinstate the dismissal order entered on May 2, 1980.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE BANK OF LITCHFIELD, A BANKING CORPORATION, APPELLEE, V. JOHN R. LUCAS, APPELLEE, ELAINE WARTA, FORMERLY ELAINE D. LUCAS, APPELLANT.

315 N.W.2d 238

Filed January 22, 1982. No. 43607.

1. **Uniform Commercial Code: Sales: Notice.** The validity of a notice of sale of collateral under Neb. U.C.C. § 9-504 (Reissue 1980) does not depend upon whether the notification actually reached the person to whom it was sent. The statute is satisfied if the steps taken were such as would be reasonably required to inform the person to be notified in the ordinary course.
2. **Uniform Commercial Code: Sales.** The direct effect of a sale that is not commercially reasonable under Neb. U.C.C. § 9-504 (Reissue 1980) is to alter the measure of the deficiency. In such case the fair and reasonable value of the collateral as of the time of the sale is offset against the balance due on the security agreement.

Appeal from the District Court for Dawson County: HUGH STUART, Judge. Affirmed.

John S. Mingus of Mingus & Mingus for appellant.

John O. Sennett of Black & Sennett for appellee bank.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and HASTINGS, JJ.

MCCOWN, J.

This is an action on a promissory note to recover judgment for the amount remaining due after the repossession and sale of an automobile which was security for the note. The District Court entered judgment against the defendants for $2,101.98 and the defendant Elaine D. Lucas has appealed.

On March 15, 1977, John R. Lucas and Elaine D. Lucas executed a promissory note to the plaintiff bank in the sum of $2,450, payable in 18 monthly installments of $150 each, beginning April 1, 1977. John R. Lucas had previously executed a security agreement covering a 1970 Ford automobile. The defendants made only sporadic small payments on

the note and on December 20, 1977, the plaintiff bank repossessed the automobile and obtained a certificate of title on January 20, 1978.

On August 24, 1978, notice was published in the local newspaper that the automobile would be sold at public auction at the plaintiff bank at 10:30 a.m. on September 2, 1978, and that the sale would be without reserve. Notices of the time and place of sale were sent by certified mail, return receipt requested, to Elaine D. Lucas and to John R. Lucas. Elaine D. Lucas, the appellant here, received and receipted for the notice on August 29, 1978. The notice to John R. Lucas was not received until after the sale. The address for John R. Lucas was the address listed on the documents held by the bank, and there is no evidence that the bank had any knowledge of any other address. The record indicates that the notice was forwarded from Litchfield, Nebraska, to Holdrege, Nebraska.

The automobile was sold in accordance with the notice on September 2, 1978, for $150. An officer of the plaintiff bank testified that in his opinion the automobile was worth $300 to $400 at the time of the sale. The proceeds of the sale were applied to the note, leaving a principal balance due of $2,008.34 plus interest to September 12, 1978, for a total of $2,294.07.

The plaintiff filed this action against the defendants in the county court, and on June 25, 1979, the county court found that the plaintiff's disposition of the collateral was not commercially reasonable and that plaintiff was not entitled to judgment, and also found that the defendant Elaine D. Lucas should have judgment on her counterclaim for damages for failure of the plaintiff to proceed in accordance with the requirements of Neb. U.C.C. § 9-507 (Reissue 1980). The county court therefore dismissed plaintiff's petition and entered judgment for the defendant on her counterclaim in the sum of $378.92. The plaintiff appealed to the District Court.

On March 20, 1980, the District Court found that the notice of sale sent by the plaintiff to the defendants was reasonable notification; that the sale of the security was not commercially reasonable under Neb. U.C.C. § 9-504 (Reissue 1980); and that the value of the automobile at the time of sale was $400 and that amount should be allowed as an offset against the balance due to the plaintiff from the defendants on the promissory note. The District Court therefore reversed the judgment for $378.92 for the defendant Elaine D. Lucas on her counterclaim. The court, after allowance of the $400 offset, also entered judgment against the defendants and each of them in the sum of $2,101.98, including principal and interest to date of judgment. Only the defendant Elaine D. Lucas has appealed to this court.

The appellant contends that the notice to defendant John R. Lucas was invalid because it was sent to a former address and was not received until after the collateral had been sold. This court has held that a creditor who has not complied with the notice provisions of § 9-504(3) before selling the collateral is barred from recovering a deficiency judgment against the debtor. See *DeLay First Nat. Bank & Trust Co. v. Jacobson Appliance Co.*, 196 Neb. 398, 243 N.W.2d 745 (1976). The appellant therefore contends that the plaintiff bank is barred from recovering a deficiency judgment in this case. We disagree.

The first problem with appellant's argument is that the notice sent to the appellant was actually received by her more than 3 business days before the sale and the notice was in compliance with all statutory requirements. When the validity of the notice to appellant is tacitly conceded, the appellant is in no position to complain as to the alleged insufficiency of notice to another defendant who has not appealed. Even if the notice to John R. Lucas were open to challenge by the appellant, the case of *First Nat. Bank & Trust Co. v. Hermann*, 205 Neb. 169, 286 N.W.2d

750 (1980), determined the issue adversely to the appellant's contention. That case held that the validity of a notice of sale of collateral under § 9-504 does not depend upon whether the notification actually reached the person to whom it was sent. The statute is satisfied if the steps taken were such as would be reasonably required to inform the person to be notified in the ordinary course.

Appellant also contends that because the District Court found that the sale was not conducted in a commercially reasonable manner, the plaintiff bank is barred from recovering any deficiency judgment. The case of *Cornett v. White Motor Corp.*, 190 Neb. 496, 209 N.W.2d 341 (1973), is determinative of that issue. In that case we held that the direct effect of a sale that is not commercially reasonable under § 9-504 is to alter the measure of the deficiency. In such case the fair and reasonable value of the collateral as of the time of the sale is offset against the balance due on the security agreement. The District Court in the case at bar did exactly that.

The judgment of the District Court was correct and is affirmed.

AFFIRMED.

WHITE, J., participating on briefs.

WHITE, J., concurring in part, and in part dissenting.

I agree with the result in this case. I disagree with only that portion of the opinion that cites with approval the holding of *First Nat. Bank & Trust Co. v. Hermann*, 205 Neb. 169, 286 N.W.2d 750 (1980). In that case I expressed the opinion that the case was incorrectly decided. I remain committed to that opinion.

HASTINGS, J., joins in this concurrence and dissent.

ELIZABETH M. CANIGLIA, APPELLANT, V. CITY OF OMAHA, A METROPOLITAN CITY, ET AL., APPELLEES.

315 N.W.2d 241

Filed January 22, 1982. No. 43621.

1. **Administrative Agencies: Appeal and Error.** In a proceeding in error the review is solely upon the record made by the tribunal whose action is being reviewed.
2. ____:____. If the record shows that the administrative agency acted within its jurisdiction and its findings are sustained by some competent evidence, its action must be sustained.
3. ____:____. Generally, an appellant has the burden to establish error in the action or order from which the appeal has been taken.
4. **Administrative Agencies: Judgments.** Where the vote of the members of a tribunal is evenly divided, it is treated as a denial of any affirmative relief.

Appeal from the District Court for Douglas County: DONALD J. HAMILTON, Judge. Affirmed.

Thomas F. Dowd of Dowd & Fahey for appellant.

Herbert M. Fitle, Omaha City Attorney, and Kent N. Whinnery for appellees.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and HASTINGS, JJ., and RONIN, Retired District Judge.

BOSLAUGH, J.

This is an appeal from a proceeding in error to review an order of the personnel board of the City of Omaha, Nebraska, dismissing the appeal of the plaintiff, Elizabeth M. Caniglia, from the order of the Public Works Department discharging her from her employment by the City.

The plaintiff was employed as a clerk-typist in the Missouri River sewage treatment plant division of the department. During her employment she was absent from work on a number of occasions because of illness and emotional problems. In January of 1978 she was asked to seek help through the city's

health assistance program because her work performance had not been satisfactory. On December 12, 1979, the plaintiff was notified in writing that she was suspended from employment effective December 17, 1979, pending dismissal on January 1, 1980. The plaintiff then perfected an appeal to the personnel board. After an evidentiary hearing the personnel board, by a vote of two to two with one member absent, denied the appeal.

The District Court found that there was competent evidence to sustain the order of the personnel board and that the action was not arbitrary, capricious, or unreasonable. The plaintiff has appealed from the order dismissing her petition in error.

The standard of review in a proceeding in error is well established. The review is solely upon the record made by the tribunal whose action is being reviewed. If the record shows that the administrative agency acted within its jurisdiction and its findings are sustained by some competent evidence, its action must be sustained. *Harnett v. City of Omaha*, 188 Neb. 449, 197 N.W.2d 375 (1972).

The record before the personnel board shows that the plaintiff had been employed by the City for 3 years as a regular employee, and for 3 years as a CETA employee. Since 1978 there had been a serious problem concerning her attendance at work and the performance of her work. In an effort to improve the situation she had been encouraged to seek help through the city's health assistance program. After she had participated in the program for 2 years, the manager of the plant, who was her supervisor, concluded she had made no long-term progress. This view was shared by a witness from the health and benefits section of the city's personnel department.

As a part of her duties the plaintiff prepared what is referred to in the record as budget sheets. These were to be prepared monthly, and in an effort to assist the plaintiff in completing this work, the last 5

working days of each month were set aside for her to work only on the budget sheets. Although there was some delay in receiving the necessary information, most of the delay in completing this work was due to the plaintiff's absences from work. In some instances there was a 6- to 7-month delay in completing the budget sheets.

The record contains the requests for leave submitted by the plaintiff in 1979. They show a total of 302 hours in 46 separate requests, which would be equivalent to approximately 38 working days.

The written notice of termination, dated December 12, 1979, summarized the basis for the termination of the plaintiff's employment. It noted that the plaintiff had been associated with the health assistance program since January 1978 but there had been no overall improvement in work performance. Since January 1, 1978, the plaintiff had used over 2 months' sick leave and had exhausted both her annual leave and sick leave. On January 27, 1978, and on November 2, 1978, the plaintiff had received 1-day suspensions for absenteeism. In November of 1978 the plaintiff received a written reprimand for failure to meet deadlines and catch up in her work. Since November 1978 the plaintiff had not caught up with her work and her absenteeism had resulted in her being further behind in her work.

The labor contract authorizes the demotion or discharge of an employee for "failure to perform job in a satisfactory manner." It also provides for a system of progressive discipline so that discharge is authorized after the fifth offense. The plaintiff contends that the City was required to impose preliminary disciplinary actions, such as reprimands and suspensions, which are authorized by the contract for the first four offenses, before the plaintiff could be discharged. The contract does not so provide. The limitation, as we understand the contract, is that an employee cannot be discharged for failure to perform

her job in a satisfactory manner until there have been five offenses within a period of 2 years. The evidence before the personnel board was sufficient to show that requirement of the contract had been satisfied.

The plaintiff also claims that it was erroneous to place a burden of disproving good cause on her, and that any action of the personnel board required three affirmative votes.

The proceeding before the personnel board was an appeal by the plaintiff from the action of the Public Works Department discharging her from her employment by the City. In the absence of an appeal, her discharge would have been final. The general rule is that an appellant has the burden to establish error in the action or order from which the appeal has been taken. In this case the plaintiff had the burden to show that good cause for her dismissal did not exist. The only burden upon the City, so far as the hearing before the personnel board was concerned, was to counter any evidence of the plaintiff so that the record before the board would support a finding that the dismissal was justified. To the extent that the opinion in *Shepherd v. City of Omaha*, 194 Neb. 813, 235 N.W.2d 873 (1975), may imply that the City has the burden of proof to establish "good cause" for the discharge of an employee who has appealed to the personnel board, the opinion is disapproved.

The plaintiff argues that § 6.04(7) of the home rule charter of the City requires three affirmative votes for any final action on any matter before the board. The record does not contain any provisions of the charter and it is a matter of which this court cannot take judicial notice. See *Dell v. City of Lincoln*, 168 Neb. 174, 95 N.W.2d 336 (1959).

In other situations we have held that where the vote of the members of a tribunal is evenly divided, it is treated as a denial of any affirmative relief. See 21 C.J.S. *Courts* § 184 b (1940); *Moser v. Turner*, 180 Neb. 635, 144 N.W.2d 192 (1966). Such a rule is one

of necessity to prevent deadlocks, and to permit a review of the action of the tribunal.

As the record now stands, the decision of the District Court was correct and its judgment is affirmed.

AFFIRMED.

KRIVOSHA, C.J., dissenting.

I find that, upon further consideration of this matter, I must respectfully dissent. The majority's opinion is, in part, based upon the court's conclusion that we cannot take judicial notice of § 6.04(7) of the home rule charter of the City of Omaha, and cites as authority for that position *Dell v. City of Lincoln*, 168 Neb. 174, 95 N.W.2d 336 (1959). It is with that aspect of the opinion that I disagree. While it is true, as noted by the majority, that a court of original jurisdiction, in the first instance, and an appellate court, on review, will not take judicial notice of a *municipal ordinance*, the situation is otherwise with regard to a home rule charter of a municipality. See *Young v. Seattle*, 30 Wash. 2d 357, 191 P.2d 273 (1948). The *Dell* case, cited by the majority, and those cases cited in the *Dell* case in support of that position all involved municipal ordinances.

In the instant case, however, we are not dealing with a municipal ordinance but, rather, with a provision of a home rule charter created pursuant to Neb. Const. art. XI, §§ 2 and 5. The difference between a municipal ordinance and a home rule charter created pursuant to the Nebraska Constitution is significant. While the municipal ordinance in its latest form may not be available for examination, a home rule charter is required by the Constitution of Nebraska to be certified by the city clerk and filed with the Secretary of State and does not become the charter unless and until it is filed with the Secretary of State. Likewise, all amendments of such charter are required to be authenticated by the city clerk and filed with the Secretary of State. In my view, this also is a signif-

icant factor.

While earlier writers may have viewed judicial notice as being limited to those matters of common knowledge, the more modern trend of judicial notice is shifting from the test of common knowledge to that of verifiable certainty. See, 29 Am. Jur. 2d *Evidence* § 25 (1967); McCormick, *Judicial Notice*, 5 Vand. L. Rev. 296 (1952).

Neb. Rev. Stat. § 27-201(2) (Reissue 1979) specifically provides that a judicial notice fact may not only be one which is generally known but may also be a fact "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Furthermore, § 27-201(3) provides that "[a] judge or court may take judicial notice, whether requested or not." An examination of earlier decisions by this court would seem to indicate that we have heretofore agreed to take judicial notice of matters whose accuracy is not in any significant degree more easily verified than the home rule charter of the City of Omaha. Without suggesting that an exhaustive study of the matter has been made, some examples are the following. In *Hornberger v. State*, 47 Neb. 40, 66 N.W. 23 (1896), we held that where a city or village is incorporated by a special act of the Territorial Legislature, the courts will take judicial notice of such incorporation in case the Legislature has in said act declared it to be a public law. In doing so, we specifically said at 49, 66 N.W. at 26: "'Courts will judicially notice the charter or incorporating act of a municipal corporation without being specially pleaded, not only when it is declared to be a public statute, but when it is public or general in its nature or purposes, though there be no express provision to that effect.'" As a result, in *Hornberger* we took judicial notice of the fact that the city of Bellevue contained a population of less than 1,500 and more than 200 and was therefore governed by virtue of § 40 of 1879 Neb. Laws, p. 193, entitled "AN ACT To provide for the organization,

government, and powers of cities and villages."

In *State v. Frank*, 61 Neb. 679, 85 N.W. 956 (1901), we held that courts will take judicial notice of legislative enactments and of the records kept by the two houses of the Legislature. It would seem that such a record is no more reliable than a charter filed with the Secretary of State. In *Elmen v. State Board of Equalization and Assessment*, 120 Neb. 141, 231 N.W. 772 (1930), we held that this court takes judicial notice of the proceedings of the constitutional convention and of the journals of the House of Representatives and of the Senate.

And in *Elson v. Harbert*, 190 Neb. 437, 208 N.W.2d 703 (1973), we held that we would take judicial notice that Frontier County was a county of less than 7,000 people and that therefore Neb. Rev. Stat. § 32-307 (Reissue 1968) was applicable. And in *Bohy v. Abbott*, 154 Neb. 139, 47 N.W.2d 95 (1951), we held that state courts will take judicial notice of general rules and regulations established and published by federal agencies under authority of law. Why we should agree to take judicial notice of general rules and regulations published by federal agencies and refuse to take judicial notice of the home rule charter of the City of Omaha, filed with the Secretary of State, is difficult for me to understand.

While I do not disagree with our earlier holdings, I fail to see why we have had no difficulty taking judicial notice of these various facts and now determine that we will not take judicial notice of a fact required to be filed with the Secretary of State. It is for that reason that I would have taken judicial notice of § 6.04(7) of the home rule charter of the City of Omaha and, accordingly, would have held that the personnel board has yet failed to act on the appeal, thereby making the appeal to this court at this time moot.

BRODKEY, J., joins in this dissent.

JANE L. NELSON, APPELLANT, V.
AUBREY J. NELSON, APPELLEE.

315 N.W.2d 245

Filed January 22, 1982. No. 43629.

Appeal from the District Court for Buffalo County: DEWAYNE WOLF, Judge. Affirmed.

Sarah J. Shofstall for appellant.

Jacobsen, Orr & Nelson for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and HASTINGS, JJ.

PER CURIAM.

The instant appeal involves a domestic relations matter.

The court, having reviewed the record in this case de novo, agrees with the result reached by the trial court. The judgment is affirmed.

AFFIRMED.

WHITE, J., participating on briefs.

IN RE APPLICATION OF PETROLEUM TRANSPORT SERVICE, INC.
PETROLEUM TRANSPORT SERVICE, INC., APPELLANT, V.
RUAN TRANSPORT CORPORATION ET AL., APPELLEES.

315 N.W.2d 245

Filed January 22, 1982. No. 43644.

1. **Motor Carriers: Proof.** The burden is on the applicant to show that the proposed service is required by public convenience and necessity.
2. **Motor Carriers.** In determining the issue of public convenience and necessity, controlling questions are whether or not the operation will serve a useful purpose responsive to a public demand or need; whether or not this purpose can or will be served as well by existing carriers; and whether or not it can be served by the applicant in a specified manner

without endangering or impairing the operations of existing carriers, contrary to the public interest.

3. **Public Service Commission: Judgments.** The issue of public convenience and necessity is ordinarily one of fact, and where there is evidence in the record to sustain the Public Service Commission's order, this court cannot say that it is unreasonable and arbitrary.
4. ____: ____ The determination of what is consistent with the public interest, or public convenience and necessity, is one that is peculiarly for the determination of the Public Service Commission. If there is evidence to sustain the finding of the commission, this court cannot intervene.

Appeal from the Nebraska Public Service Commission. Affirmed.

Scott T. Robertson of Peterson, Bowman & Johanns for appellant.

James E. Ryan of Ryan & Williams, P.C., for appellees.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and HASTINGS, JJ.

MCCOWN, J.

Petroleum Transport Service, Inc., filed its application seeking an extension of its present authority as a common carrier of fertilizer and fertilizer ingredients. The Public Service Commission denied the application and the applicant has appealed.

Petroleum Transport Service, Inc., presently holds Nebraska intrastate authority to transport anhydrous ammonia and fertilizer solutions from the Phillips Petroleum plant at Hoag, Nebraska, to all points and places in Nebraska over irregular routes. The applicant seeks to extend its present authority to authorize the transportation of fertilizer and fertilizer ingredients between all points in Nebraska over irregular routes. Applicant also holds interstate authority and Iowa authority. If the requested extension of authority were granted, applicant intends to purchase additional equipment as necessary and provide service both during the peak season and the off-season. There is

no dispute that the applicant is fit, willing, and able to perform the proposed service. Several common carriers presently providing such common carrier services filed protests.

The evidence at the hearing before the Public Service Commission established that there is a peak season for transportation of fertilizer products which occurs sometime during March, April, and May. The length of time and the extent of demand vary, dependent upon the weather and other conditions. During the peak season more than half of the total yearly volume of fertilizer and fertilizer products is shipped.

Witnesses all indicated that there was a shortage of equipment to provide service during the peak season. Except during the peak season, fertilizer carriers have idle equipment. Virtually all the witnesses who testified in support of the application referred to instances of refusals of service which occurred during the peak season and essentially these witnesses testified that they supported the application in order to enhance the availability of equipment during the peak season. The evidence shows that the fertilizer shippers allocate their business during the off-season among the carriers, generally on a pro rata basis according to the amount handled by the particular carrier during the peak season.

The protestants expressed concern that their off-season business would be detrimentally affected by an extension of applicant's authority. The applicant's shipper witnesses testified that they anticipated a substantial growth in the manufacture and use of fertilizer and that the shippers' use of the applicant's service, if authorized, would not divert business from the existing fertilizer carriers. These shipper witnesses also testified that the need for equipment was small during the off-season.

Following the hearing, the Public Service Commission found that present carriers cannot fulfill the need for transportation of fertilizer and fertilizer

solutions during the peak season each calendar year; that there was never enough equipment during the peak season and there is too much equipment during the remainder of the year; that if the application were granted the protestants would lose shipments during the off-season; and that protestants need the off-season loads to help pay the high cost of equipment. The commission found that the proposed service was not required by the present or future public convenience and necessity and denied the application.

The applicant contends that the denial of the application was arbitrary and capricious, and is not supported by substantial evidence in the record. Applicant's position is that there is no need to prove that the service of existing carriers is inadequate, and that a showing that the proposed additional service will better serve the public is all that is required. The applicant also contends that the economic condition of the existing carriers will not be harmed if the application is granted and that increased competition would be in the public interest.

Neb. Rev. Stat. § 75-311 (Reissue 1976) requires an otherwise qualified applicant to show "that the proposed service . . . is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied."

The burden is on the applicant to show that the proposed service is required by public convenience and necessity. This court has consistently held that in determining the issue of public convenience and necessity, controlling questions are whether or not the operation will serve a useful purpose responsive to a public demand or need; whether or not this purpose can or will be served as well by existing carriers; and whether or not it can be served by the applicant in a specified manner without endangering or impairing the operations of existing carriers, contrary to the public interest. *In re Application of Greyhound Lines, Inc.*, 209 Neb. 430, 308 N.W.2d 336 (1981).

The issue of public convenience and necessity is ordinarily one of fact, and where there is evidence in the record to sustain the Public Service Commission's order, this court cannot say that it is unreasonable and arbitrary. The determination of what is consistent with the public interest, or public convenience and necessity, is one that is peculiarly for the determination of the Public Service Commission. If there is evidence to sustain the finding of the commission, this court cannot intervene. *Ace Gas, Inc. v. Peake, Inc.*, 184 Neb. 448, 168 N.W.2d 373 (1969). In the case at bar the evidence in the record supports the findings of the commission and the denial of the application was not arbitrary or capricious.

AFFIRMED.

WHITE, J., participating on briefs.

WARREN C. SCHREMPP, APPELLEE, V.
J. WILLIAM GALLUP ET AL., APPELLANTS.

315 N.W.2d 248

Filed January 22, 1982. No. 43950.

Promissory Notes: Contracts: Consideration. In order for a detriment to the promisee to constitute a valid consideration for a note or contract, it must have been within the express or implied contemplation of the parties and known to and agreed to by them.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Reversed and remanded.

Martin A. Cannon and Michael G. Goodman of Matthews & Cannon, P.C., for appellants.

Warren C. Schrempp, pro se.

Heard before KRIVOSHA, C.J., BRODKEY, WHITE, and HASTINGS, JJ., and WINDRUM, District Judge.

WINDRUM, District Judge.

Plaintiff commenced this action against the defendants upon a note in the amount of $4,500, executed by defendants on December 31, 1975, made payable to plaintiff and delivered to plaintiff. Defendants alleged there was no consideration for the note. A motion for summary judgment by plaintiff was sustained, and the matter was eventually appealed.

In 1960 Warren Schrempp, hereinafter referred to as plaintiff, owned a leasehold interest on the 11th floor of the Farm Credit Building in Omaha, Nebraska. The portion leased consisted mostly of a large, open space, not really suited for a law office in its then present state. Plaintiff made extensive improvements at his own expense. The improvements transformed the leased premises into a sumptuous law office.

At a later date plaintiff moved to another office building, but at the time retained the lease, as the rent was very modest and he desired to control who occupied the premises. Eventually, J. William Gallup, Walter J. Matejka, and Richard J. Bruckner, hereinafter referred to as defendants, subleased a portion of the premises, being the only portion of the building still leased by plaintiff. Between Christmas and New Year's of 1975, defendant Bruckner and plaintiff had discussions concerning the lease. Bruckner suggested that the three defendants would like to take over the space. Plaintiff wanted to retain the same, and gave as a reason that it had been his investment that made the space attractive considering the amount of rent involved. Bruckner suggested that defendants pay plaintiff around $4,500 if they could take over the lease.

On December 30, 1975, the defendants drew a contract which was accepted by plaintiff on December 31, 1975. Said contract mentions the improvements, the sale thereof, and the price of $4,500 to be paid by a note. Nowhere does the contract, which was in letter form, mention any forbearance to be exercised on the

part of plaintiff, insofar as renegotiating another lease is concerned.

The defendants drafted and signed a note, the form of which has no legal significance in this case, for $4,500 payable to plaintiff, due without interest on January 1, 1978. The note was dated December 31, 1975, and delivered to plaintiff with the letter proposal. Plaintiff made no effort to renew his lease. Defendants entered into a lease directly with the owner of the building.

On December 31, 1975, the lease was expiring. All of plaintiff's rights in any improvements expired with it. Defendants were unaware that December 31, 1975, was the last day. Defendants take the position they received no consideration for the note. Plaintiff, however, maintains that as a result of the transaction between the parties, he exercised a forbearance on his part to renew the lease, thus at least he, as promisee, suffered a disadvantage.

A party is entitled to summary judgment only when there exists no genuine issue as to any material fact and the undisputed facts call for a decision in his favor. No citations are required.

Defendants maintain there was no consideration for the note as the improvements made by plaintiff to the leasehold reverted to the landlord at the termination of the lease, and the lease terminated on the date of the note sued upon. Plaintiff counters that he could have negotiated a new lease, and because of the agreement, he did not.

Plaintiff asserts, as a proposition of law, that a promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise, citing *Leach v. Treber*, 164 Neb. 419, 82 N.W.2d 544 (1957); *May v. City of Kearney*, 145 Neb. 475, 17 N.W.2d 448 (1945); *Kucera v. Kavan*,

165 Neb. 131, 84 N.W.2d 207 (1957); and *Pike v. Triska*, 165 Neb. 104, 84 N.W.2d 311 (1957). Further, he states as a proposition of law that forbearance to act of a promisee of a promissory note is sufficient consideration to support the validity of the note, again citing, among others, *Leach v. Treber, supra.*

It was held in *Scottsbluff Nat. Bank v. Blue J Feeds, Inc.*, 156 Neb. 65, 54 N.W.2d 392 (1952): "In order for a detriment to the promisee to constitute a valid consideration for a note or contract, it must have been within the express or implied contemplation of the parties and known to and agreed to by them." (Syllabus of the court.) Said syllabus is quoted in *Leach v. Treber, supra*, and has never been cited thereafter. It is controlling herein.

The defendant Richard Bruckner seems to have been the primary negotiator between the plaintiff and defendants. His deposition was taken. He testified that defendant Matejka did not feel he owed anything on the note. Plaintiff then asked the following: "Q. Was it your feeling, Dick? A. Yes, it was, Warren, after we went down and looked at the leases it was. After we checked them out, because we felt that there wasn't — we didn't owe for the improvements, one, because at the time of the cancellation of the lease they would have gone back to the building; and again, I was in a unique position at the time, since I had the north offices and was dealing on those, but did get in as far as negotiation concerning the south offices, and did sign the note at the time, thinking that you had a right to extend the lease or had — in fact, I really didn't know when your lease ended at that time. We found that out — I am sure we didn't check it for two years after that until we went down and actually took a look at the Farm Credit Building to see that that lease had expired on December 31st of 1975."

In view of such a statement, there exists a substantial question of fact as to whether or not a forbearance on the part of plaintiff to negotiate a new lease was

within the express or implied contemplation of the parties and known to and agreed to by them.

Judgment for plaintiff is reversed and the case remanded for further action in accordance with this opinion.

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. PAUL J. ROWE, APPELLANT.

315 N.W.2d 250

Filed January 22, 1982. No. 44041.

1. **Homicide: Juries: Verdicts.** In all trials for murder the jury before whom such trial is had, if they find the prisoner guilty thereof, shall ascertain in their verdict whether it be murder in the first or second degree, or manslaughter. Neb. Rev. Stat. § 29-2027 (Reissue 1979).
2. **Homicide: Words and Phrases.** A person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation. Neb. Rev. Stat. § 28-304 (Reissue 1979).
3. ____:____. A person commits manslaughter if he kills another without malice, either upon a sudden quarrel, or causes the death of another unintentionally while in the commission of an unlawful act. Neb. Rev. Stat. § 28-305 (Reissue 1979).
4. **Homicide: Jury Instructions: Lesser-Included Offenses.** Where murder is charged, the court is required, without request, to charge on such lesser degrees of homicide as to which the evidence is properly applicable. In order for this rule to require an instruction on manslaughter, the record must contain some evidence which would tend to show that the crime was manslaughter rather than murder.
5. **Homicide: Words and Phrases.** Malice denotes that condition of mind which is manifested by the intentional doing of a wrongful act without just cause or excuse. Absence of malice may exist where the killing occurs upon a sudden quarrel.
6. **Juror Qualifications.** A juror who cannot subordinate his personal views on an issue of law and obey the law in deciding the case must be excused for cause.
7. **Evidence.** The admission of photographs of a gruesome nature rests largely within the sound discretion of the trial court, which must determine their relevancy and weigh their probative value against their possible prejudicial effect.
8. **Homicide: Jury Instructions.** It is ordinarily not necessary to define the

term death in a prosecution for homicide.

9. **Evidence: Appeal and Error.** Irrelevant matters should not be admitted in evidence, but their admission does not require reversal unless the effect is prejudicial.
10. **Criminal Law: Evidence: Insanity.** While considerable latitude is permitted in the admission of evidence tending to show the mental condition of the accused when insanity is the defense, it must relate to the mental state of the accused at the time of the acts charged.
11. **Criminal Law: Extrajudicial Statements: Hearsay.** An accused's out-of-court statements offered by him are hearsay and ordinarily inadmissible unless coming within some exception to the rule excluding hearsay evidence.

Appeal from the District Court for Cass County: RAYMOND J. CASE, Judge. Affirmed in part, and in part reversed and remanded for a new trial.

Kirk E. Naylor, Jr., for appellant.

Paul L. Douglas, Attorney General, Dale D. Brodkey, and Linda Willard for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, and HASTINGS, JJ., and RONIN, Retired District Judge.

PER CURIAM.

The defendant, Paul J. Rowe, was charged in the District Court for Cass County with having on May 1, 1980, committed murder in the first degree and arson in the first degree. The court submitted to the jury the issues of the defendant's guilt on a charge of murder in the second degree and arson in the second degree. The jury returned verdicts of guilty on these charges, and the court sentenced the defendant to a term of life imprisonment on the homicide charge and to a concurrent term of 3 to 5 years on the arson charge.

In this court the defendant makes and argues the following assignments of error: (1) The trial court erred in refusing the defendant's requested instruction which would have submitted to the jury the lesser-included offense of manslaughter. (2) The court erred in refusing to sustain the defendant's challenge for cause of one

member of the jury panel. (3) The court erred in overruling the defendant's objection to the admission in evidence of certain photographs of the victim of the homicide. (4) The court erred in refusing to instruct the jury on "brain death" in accordance with the defendant's tendered instruction. (5) The court erred in failing to sustain the defendant's objection to questions asked by the prosecutor relating to the difference in the defendant's appearance on May 1 and at trial. (6) The court erred in refusing to receive in evidence tape recordings of an interview of the defendant by a defense psychiatrist, which interview took place while the defendant was under the influence of sodium amytal administered by the psychiatrist for the purpose of the interview. The tapes were part of the psychiatrist's basis for evaluating the defendant's mental state during part of the times relevant to the crimes charged.

We reverse the homicide conviction because of the court's failure to instruct the jury on the lesser-included offense of manslaughter and remand for a new trial on the homicide charge. We affirm the arson conviction and sentence.

A resume of some of the evidence and general background facts is necessary to a discussion of some of the assigned errors. Other evidentiary facts will be related as necessary in connection with our discussion of the particular assignments.

The defendant and his wife, Layne Rowe, resided in a farm residence near Alvo, Nebraska. The defendant was an independent trucker. The wife was employed by a Lincoln manufacturer. On the morning of May 1, 1980, passers-by noticed smoke coming from the Rowe residence and noted the house was burning. The fire department was called. After the fire had been extinguished, the body of Layne Rowe was discovered, wrapped in a blanket and lying on a bed in one of the second floor bedrooms. The defendant was not found at the residence, but later that day family members informed the "authorities" that the defendant was in a

Lincoln hospital where he had earlier that day been admitted upon the request of a Lincoln psychiatrist, Dr. E. F. Whitla.

Mrs. Rowe's body, when discovered, was found to be mutilated in the following fashion: One breast had been removed with a sharp instrument. An incision with a sharp instrument had also been made in the torso from just below the sternum through the vaginal and rectal areas, exposing the viscera and other internal organs. A later autopsy disclosed that in addition to the mutilations above described, Mrs. Rowe had suffered a skull fracture in the area back of the left ear. The sternum was also fractured.

The pathologist who performed the autopsy testified that a skull fracture of such a nature would have ultimately resulted in death. However, the immediate cause of death was bleeding, a consequence of the mutilations in which the iliac artery to the right leg had been severed. In the pathologist's opinion, the skull fracture occurred before the mutilations. The basis for the opinion was that in order for the mutilations to have occurred, the victim would have had to have been unconscious because there were no signs of resistance as indicated by an absence of any defensive wounds or bruises on the arms. He further expressed the opinion that the victim was still alive when the incision was made and the artery severed. This conclusion was evidenced by the absence of blood in the heart and blood vessels, indicating that the heart was still beating when the cutting occurred.

The pathologist further testified that he believed the skull injury resulted from a moving object striking the skull. He explained the forensic medical reasons for this conclusion. The nature of the fracture was consistent with one which would result from a blow with the side of the head of a clawhammer found on a landing at the head of the stairs near the entrance to the bedrooms. He stated that the fracture could not have been caused by the head striking a flat object such as a floor. On

cross-examination he indicated that it was possible, but unlikely, that the fracture could have resulted from the head striking the edge of the steps.

The defendant, through counsel and in open court, judicially admitted he made the cuts upon his wife's body.

The defense to the homicide charge had two aspects. First, the defendant denied he had struck his wife, and argued that the skull fracture must have occurred when she fell down a stairway. Secondly, he argued that when the cutting of his wife's body occurred, he was suffering from a "brief reactive psychosis," a consequence of the belief his wife was dead. It was also argued that he was in the psychotic state when he admittedly set the house afire.

The defendant took the stand in his own behalf. He testified that he did not strike his wife with any object. According to his version of events, he came home about 11 p.m. on the day before the fire. He had been at a bar, drinking beer and dancing. When he came home Layne was in bed. He had another beer and then went to bed in the room in which he and Layne habitually slept. Layne was sleeping in the guest bedroom. He assumed this was because she had to rise about 4:30 a.m. to be at work at 6 a.m. He fell asleep without disturbing her. Later he heard a noise and got up to investigate. He found Layne at the bottom of the steps, unconscious and bleeding from the nose. He attempted to revive her, using cardio-pulmonary resuscitation, but his efforts failed. He felt she had left him. He wanted to join her and attempted to shoot himself, but the weapon did not fire. The earlier described mutilation then took place. His testimony surrounding the mutilation was similar to that he related to the defense psychiatrists, on the basis of which they rendered their opinion of "brief reactive psychosis," initiated by his wife's assumed death. The psychiatrists stated he did not know right from wrong nor appreciate the nature and quality of his act during the time of the mutilation. Their testimony was based upon the defend-

ant's statements made to them during their examination of him. The testimony of the psychiatrist testifying for the prosecution contradicted that of the defense and was to the effect the defendant was legally sane at the time of the occurrence in question.

At the close of all the evidence, the defendant moved the court not submit to the jury the charge of murder in the first degree. The court granted that motion because there was no evidence from which the jury could conclude the homicide, if such it was, was premeditated. The court charged the jury on the elements of murder in the second degree and denied the defense request (as well as that of the prosecution) that the instructions include submission of the crime of manslaughter.

Neb. Rev. Stat. § 29-2027 (Reissue 1979) provides in part: "In all trials for murder the jury before whom such trial is had, if they find the prisoner guilty thereof, shall ascertain in their verdict whether it be murder in the first or second degree, or manslaughter . . . ." Neb. Rev. Stat. § 28-304 (Reissue 1979) provides in part: "(1) A person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation." Neb. Rev. Stat. § 28-305 (Reissue 1979) provides in part: "(1) A person commits manslaughter if he kills another without malice, either upon a sudden quarrel, or causes the death of another unintentionally while in the commission of an unlawful act."

The rule in this and most jurisdictions is that where murder is charged, the court is required, without request, to charge on such lesser degrees of homicide as to which the evidence is properly applicable. Under this rule, to require an instruction on manslaughter the record must contain some evidence which would tend to show that the crime was manslaughter rather than murder. *State v. Beers*, 201 Neb. 714, 271 N.W.2d 842 (1978). Malice denotes that condition of mind which is manifested by the intentional doing of a wrongful act without just cause or excuse. *State v. Beers, supra.*

The question which must be decided is whether there

is at least some evidence which would permit the jury to find the defendant guilty of a killing without malice, either upon a sudden quarrel or unintentionally while in the commission of an unlawful act.

It is clear that evidence which indicates an accused strikes another in the head with a hammer with sufficient force to inflict a very deep skull fracture, sufficient of itself to ultimately cause death, and then inflicts with a sharp instrument wounds so severe that any rational person would know that death will result therefrom is sufficient to show an intention to kill. The same conclusion, of course, could be reached from the facts indicating that death resulted from the use of the hammer alone.

The difference between murder in the second degree and manslaughter, as defined in the first clause of § 28-305, is the absence of malice. Absence of malice may exist where the killing occurs upon a sudden quarrel. See *State v. Beers, supra.* Here there was circumstantial evidence from which the jury could conclude that this killing was a consequence of a sudden quarrel. The defendant came home after a night of drinking and dancing. He found his wife not in the bed which they customarily shared, but in another room. His sexual desires were urgent. (He acknowledged he was naked when all the events at the residence transpired.) Fulfillment of his desires was rejected. This resulted in a quarrel, the result of which was his striking his wife with a hammer. His rage was still so great that he mutilated her sexual organs. The pathologist testified: "When the incision got into the area of the pubic hair, from this area down into the rectum and the vagina, there were multiple cuts going in various directions, some of which extended up into the vagina."

Assuming the jury accepted the defendant's contention that his wife was rendered unconscious by a fall, it is clear they must have rejected his claim that during what followed he did not know right from wrong nor appreciate the nature and quality of his act. Having re-

jected that claim, they could find that he unjustifiably thought his wife was dead and then caused her death while in the course of an unlawful act, to wit, assault. Neb. Rev. Stat. § 28-309(1)(a)(b) (Reissue 1979); *State v. Worley*, 178 Neb. 232, 132 N.W.2d 764 (1965).

It is neither for the trial court nor for this court on appeal to draw conclusions of fact when two reasonable inferences may be drawn from the evidence. The trial court erred in not submitting to the jury the lesser-included offense of manslaughter along with the charge of murder in the second degree.

During the voir dire examination of the jury panel, one of the members of the panel, in responding to questions by defense counsel, expressed awareness that an accused found not guilty by reason of insanity might soon be released. The same panel member then responded to questions propounded by defense counsel as follows: "Q — Now you recognize, do you not, that if you were to find in this case that Paul Rowe was insane at the time that he did some things, caused injuries to the body of his wife and set fire to his home on May 1st of this year, if you found that he was insane at the time, or even if you had a reasonable doubt as to his sanity, the burden of proof being on the prosecution, would it be your obligation to find him not guilty?
"A — So then what is the question?
"Q — Well, then he wouldn't be punished in that case. Could you live with that idea?
"A — No.
"Q — It would be difficult for you to do that?
"A — Uh-huh.
"Q — Well, then that would bring the question up in this case: Really, can you follow the law? It may be a crime not to follow the law in certain situations. You know what I mean? Like speeding or stopping at the stop sign. But you realize that if you were to tell the judge in this case: My feeling is, look, I know that the law provides for a defense of insanity and I know that the law provides that if a person is insane at the time they do a

particular thing, a thing that I see as being terrible, that I am to find them not guilty. They're not to be punished. But still I feel so strongly about the matter that I just couldn't follow the law in that regard. Do you have that feeling?

"A — I believe I probably would have.

"Q — So do you think then that no matter what the judge said about the law in the case, that you would not be able to accept the defense of insanity if it meant that the person would not be punished?

"A — Yes, that's true.

"MR. NAYLOR: Your Honor, I would ask that Mrs. Murdoch be excused for cause."

The trial judge then questioned this panel member as follows: "THE COURT: Mrs. Murdoch, you have answered that question on at least a half dozen occasions in a different phraseology where you could follow the law. You told the Court this. You could put aside your personal feelings and you could make a determination exactly from what evidence was presented here in court.

"MRS. MURDOCH: Uh-huh.

"THE COURT: Now do you understand the question? Are you changing your answers?

"MRS. MURDOCH: I hope not. I hope I'm not changing my mind. I feel that I could listen in and make a decision according to the law.

"THE COURT: That's exactly what the law demands of you. And that's — No, I'll deny that challenge."

Thereafter, the defendant used one of his peremptory challenges to strike the juror from the panel.

It is the rule that a juror who cannot subordinate his personal views on an issue of law and obey the law in deciding the case must be excused for cause. *State v. Kirby*, 185 Neb. 240, 175 N.W.2d 87 (1970). However, it appears from the questioning by the court that the feeling of the juror was not so fixed that she would be unable to abide by the court's instruction as to the law. The court did not err in overruling the challenge.

The defendant argues it was error for the court to receive in evidence over his objection four photographs, exhibits 30, 31, 32, and 33. The photographs were, respectively: (1) One picture of Layne Rowe's body in the condition it was delivered to the hospital for the autopsy, partially covered with a burned quilt. (2) One picture of the torso showing the mutilations. (3) Two photographs of the victim's skull taken during the autopsy. The objections to these exhibits are: (1) They are irrelevant because the defendant had stipulated he did the cutting. (2) The risk of unfair prejudice outweighs the marginal relevance the photographs might have. (3) Sufficient foundation was not established because it is not clear from the evidence when the skull photos were taken.

In objecting to these exhibits, the defendant relies upon the principles stated in Neb. Rev. Stat. § 27-403 (Reissue 1979) as follows: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

The objection on the grounds of relevance is founded upon the defendant's stipulation that the defendant did the cutting and the pathologist described adequately his observations, what he did during the autopsy, and his conclusions. The objection on the basis of unfair prejudice is founded upon the proposition that the photographs are "grisly" and "gruesome." It must be conceded they are. The third objection is based upon the claim that the jury might have believed the photos of the skull showed injuries made by the defendant rather than wounds from the autopsy.

In *State v. Williams*, 205 Neb. 56, 67, 287 N.W.2d 18, 25 (1979), we said: "The admission of photographs of a gruesome nature rests largely within the sound discretion of the trial court, which must determine their relevancy and weigh their probative value against their

possible prejudicial effect. State v. Freeman, 201 Neb. 382, 267 N.W.2d 544. Although it is true that the probative value of gruesome photographs should be weighed against the possible prejudicial effect before they are admitted, if a photograph illustrates or makes clear some controverted issue in a homicide case, a proper foundation having been laid, it may be received, even if it is gruesome. State v. Partee, 199 Neb. 305, 258 N.W.2d 634. In a homicide case, photographs of the victim, upon proper foundation, may be received in evidence for purposes of identification, to show the condition of the body, the nature and extent of wounds or injuries, and to establish malice or intent. State v. Dittrich, 191 Neb. 475, 215 N.W.2d 637."

The defendant's judicial admission covered only the fact that he mutilated his wife's body. He did not admit he caused the skull fracture. It is clear from the testimony that exhibits 32 and 33 were made during the autopsy; one photo being taken after the scalp had been laid back and the other after the skull had been opened. The testimony showed that the head wound which occurred when the skull was fractured was not evident from casual external examination, and there was no external bleeding from the wound. These two photographs show quite clearly the depth and, to some extent, the configuration of the fracture in a way that words cannot express. These photographs would assist the jury in determining the validity of the pathologist's testimony that the fracture occurred in the way he stated it did. One photograph in particular illustrates the severity of the impact which caused the fracture. These photographs would tend to lead a layman to the conclusion that such a fracture could not be caused by a fall on wooden steps. The court would have erred if it had refused the admission of these photographs, even though the State would have no recourse had they not been received.

The picture of the torso and the blanket-wrapped body fall into the category which we believe lies within

a proper judicial discretion. The picture of the torso shows the nature of the major incision and would tend to cast doubt on the defendant's statement to the psychiatrists that a purpose of the cutting was to remove a baby, which defendant believed Layne might be carrying. This photo also tended to show either the defendant's insanity or, on the other hand, the extent of his rage. The photo of the blanket-covered body was marginally relevant, but would tend to support the contention that the purpose of the fire was to conceal the crime by burning, thus casting some doubt upon the defendant's claim that the fire was set to purge the house of the evil spirit he believed was present. The admission of these last two photographs on retrial will be at the discretion of the district judge.

The defendant requested that the jury be given the following instruction: "The term 'death,' as used throughout Instruction No. _____ means a physical state when a human body is:

"1. Unresponsive to normally painful stimuli, is;

"2. without spontaneous movements or breathing; and

"3. is without reflexes.

"If all of the foregoing conditions exist, death has occurred." The defendant's argument supporting his request of this instruction is somewhat complex, but its essence is that counsel wished to argue to the jury that when the mutilations occurred Layne Rowe had already suffered "brain death" and as a consequence the mutilations were not the cause of her death.

The court did not err in refusing this instruction, for there is no evidence which would make that definition applicable. The only competent evidence before the court was that Layne Rowe was alive when the mutilations occurred, i.e., her heart was still beating and she was still breathing. The pathologist testified that the conventional definition of death involves permanent cessation of heart action and breathing. Furthermore, the requested instruction, standing alone, would have been confusing to the jury, for it was not applicable

except by separating the responsibility for the consequences of the skull fracture and the mutilation. The jury could not have determined how to apply that definition if the verdict was based upon a finding of defendant's responsibility for both the skull fracture and the mutilations. The question for jury simply was, did Layne Rowe die because of a culpable act of the defendant, either the blow to the head and the mutilation, or the mutilation alone? An issue on death such as the defendant raised by the requested instruction might arise when the victim's life was sustained by life-support systems and dies when those systems are removed by other than the accused, or perhaps where the removal of the life-support systems is the claimed wrongful act.

On cross-examination of a defense witness the following occurred. "Q — Mr. Rowe, is Paul's physical appearance today the same as it was the day of May 1st when you saw him?

"A — No.

"Q — I don't mean the way he acted, just the appearance. What's different?

"MR. NAYLOR: Your Honor, I would object to that as being irrelevant.

"THE COURT: Overruled.

"A — He had a mustache.

"Q — How about his hair?

"MR. NAYLOR: Your Honor, I would object. That is irrelevant.

"THE COURT: Overruled.

"A — It might have been a little longer, not very much."

The questions about the difference in the defendant's appearance were irrelevant to any issue before the court. The objection should have been sustained. However, the answers were innocuous, and we do not believe the prosecutor's implication could bear any weight whatsoever with the jury in its determinations. The prosecutor is directed not to repeat such nonsense on the retrial.

We now reach the final question of whether the court erred in refusing to receive in evidence the tapes of the interview by one of the psychiatrists. At this point it should be made clear that the psychiatrist was not in any way restricted in testifying as to the bases of his diagnosis, including everything the defendant told him. Dr. Baldwin interviewed the defendant a second time on June 13, 1980. Before the second interview, the doctor injected the defendant with the drug sodium amytal. The purpose of injecting the drug, the doctor testified, was to enable the defendant to talk more freely about painful emotions. The defendant offered the tapes in conjunction with the doctor's testimony to point out what he determined to be the indications of psychosis. The court rejected the offer of the tapes. The nature of the evidentiary offer may be summarized from the following statements in the defendant's brief at 61-63: "Dr. Baldwin testified that the use of the drug assisted him *by reducing the defendant's inhibitions*, in determining his mental state at the time of the alleged crimes (683:3), and he offered to point out what he determined to be the indications of psychosis thru [sic] the use of a tape recording made of the interview (683:11). He was prohibited by the trial court from so doing (684:3).

"Prior to the testimony of Dr. Baldwin, defense counsel alerted the trial court to the fact that he intended to offer in evidence, during Dr. Baldwin's testimony, two tape recordings made by Dr. Baldwin during the June 13th interview while defendant was under the influence of sodium amytal. Further, that Dr. Baldwin would testify, as he ultimately did, that the tapes would assist him in a *practical description of the defendant's mental state at the time of the crimes charges* (551:23) . . . .

. . . .

"The defendant then made a detailed offer of proof, which established that if Dr. Baldwin were allowed to testify about the recordings he would testify that they

presented a true and accurate record of the conversation he had with the defendant while defendant was under the influence of sodium amytal on June 13, 1980, that sodium amytal was a generally accepted diagnostic and evaluation tool used within his profession, *and that he used the drug successfully in this case to develop evidence of the defendant's thinking processes and state of mind at the time of the crimes charged* (675:13)." (Emphasis supplied.)

At this point it must be noted the defense is that the defendant suffered from a "brief psychotic episode." The testimony of the two defense psychiatrists differed principally only as to the time when the psychotic episode began. Both testified he was in a psychotic state at the time he made the cuts and set the fire. No claim of psychosis is made in relation to the time the State contends he struck his wife with a blunt instrument. Dr. Baldwin implied that disoriented thinking, but not the psychotic state, began when he saw his wife at the bottom of the stairs. Dr. Whitla testified the defendant was not psychotic when he first carried his wife upstairs and laid her on the bed (according to Rowe he did this twice, once before and once after the mutilation — the mutilation having taken place in the bathtub downstairs). Dr. Whitla stated defendant was not psychotic when he saw him on the afternoon of May 1 after the events.

The taped interviews contained defendant's statements of his thoughts when he awoke after hearing a thud. Also included are responses to leading questions not related to the defendant's state of mind, but to observations that he had made, i.e., whether the blood spurted when he did the cutting. The doctor's own statement indicates the purpose of that particular question was to determine whether Layne Rowe was dead at the time. Such out-of-court statements are clearly not relevant to the issue of the defendant's mental state at the time of the alleged crimes. While considerable latitude is permitted in the admission of evidence tending to

show the mental condition of the accused when insanity is the defense, it must relate to the mental state of the accused at the time of the acts charged. *Lyons v. State*, 156 Neb. 550, 57 N.W.2d 82 (1953); *State v. Moore*, 303 S.W.2d 60 (Mo. 1957); 22A C.J.S. *Criminal Law* §§ 620(1) and 737 (1961). The acts and observations mentioned, as well as others on the tapes, were hearsay statements and inadmissible under the provisions of Neb. Rev. Stat. § 27-801(3) and (4)(a) (Reissue 1979). Neither do they come within the exception of Neb. Rev. Stat. § 27-803(3) (Reissue 1979). The court did not err in rejecting the taped interviews. The jury would most likely consider defendant's statements as substantive evidence.

Although the defendant's offer was couched in terms of not being offered to prove the truth of the defendant's statements, it seems clear enough that the doctor's statement about "reducing inhibitions" tends to imply reliability of the defendant's statement while under the influence of the drug. This position has been rejected by most courts which have considered the use of such drugs. *People v. Fournier*, 86 Mich. App. 768, 273 N.W.2d 555 (1978); *People v. Cox*, 85 Mich. App. 314, 271 N.W.2d 216 (1978); *People v. Johnson*, 32 Cal. App. 3d 988, 109 Cal. Rptr. 118 (1973) (in the latter case the statements were offered for purposes of incriminating the defendant); *People v. Hiser*, 267 Cal. App. 2d 47, 72 Cal. Rptr. 906 (1968); *State v. Chase*, 206 Kan. 352, 480 P.2d 62 (1971); *Marshall v. State*, 620 P.2d 443 (Okla. Crim. 1980).

The arson conviction and the related sentence are affirmed. The conviction on the homicide charge is reversed and remanded for a new trial.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR A NEW TRIAL.

WHITE, J., participating on briefs.

CLINTON, J., dissenting in part and concurring in the result.

I respectfully dissent from the portion of the opinion which holds that the peremptory challenge of the juror Mrs. Murdoch was not error. It is the rule that a juror who cannot subordinate his personal views on an issue of law and obey the law in deciding the case must be excused for cause. *State v. Kirby*, 185 Neb. 240, 175 N.W.2d 87 (1970). The answer of the juror to counsel's question was rather clear-cut. The court should not have attempted to rehabilitate the juror. See *Irvin v. Dowd*, 366 U.S. 717, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961). The court erred in not sustaining the challenge.

However, since the juror did not serve, the question becomes whether or not the defendant was prejudiced by the necessity of using one of his peremptory challenges to remove the juror. In some jurisdictions the need to use a peremptory challenge to disqualify a juror who should have been removed for cause is presumed to constitute prejudical error. However, that is not the law in this jurisdiction. If a trial court erroneously fails to sustain the proper challenge of a juror for cause, a reversal will not result unless the record shows that the error brought injury to the accused. *Bufford v. State*, 148 Neb. 38, 26 N.W.2d 383 (1947). This case overruled earlier Nebraska cases holding otherwise. The record in this case does not show the defendant was prejudiced by having to use the peremptory challenge.

I concur in the remainder of the opinion and, therefore, concur in the result.

STATE OF NEBRASKA, APPELLEE, V. LLOYD L. TRAXLER, APPELLANT.

315 N.W.2d 440

Filed January 22, 1982. No. 44424.

Search Warrants: Search and Seizure. When officers, in the course of a bona fide effort to execute a valid search warrant, discover articles which, although not included in the warrant, are reasonably identifiable

as contraband, they may seize them whether they are initially in plain sight or come into plain sight subsequently as a result of the officers' efforts.

Appeal from the District Court for Cheyenne County: JOHN D. KNAPP, Judge. Affirmed.

P. J. Heaton, Sr., for appellant.

Paul L. Douglas, Attorney General, and Mark D. Starr for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

CLINTON, J.

The appellant, Lloyd L. Traxler, was convicted before a jury in the District Court for Cheyenne County of possession of a short shotgun as prohibited by Neb. Rev. Stat. § 28-1203(1) (Reissue 1979), which states: "Any person or persons who shall transport or possess any machine gun, short rifle, or short shotgun commits a Class IV felony." Although the appellant makes several assignments of error, the only assignment argued in his brief addresses the alleged unconstitutional seizure of a short shotgun seized in a search conducted pursuant to a warrant which authorized a search for drugs and drug paraphernalia, and, therefore, we need only address that issue. Neb. Ct. R. 8.a.2.(3) (Rev. 1977). The trial court overruled the appellant's motion to suppress the shotgun as evidence resulting from an illegal search and seizure. After the appellant was found guilty, he was sentenced to a term of 20 months to 5 years in the Nebraska Penal and Correctional Complex and fined $5,000 in addition to costs.

The facts, as revealed by the evidence surrounding the events leading to the appellant's conviction, are as follows. On August 30, 1980, the appellant's residence at 928 7th Avenue, Sidney, Nebraska, was searched pursuant to a warrant authorizing the search for drugs and drug paraphernalia. During the course of the search, several marijuana pipes or bongs and a small

amount of marijuana were discovered in the residence. In addition to these items, a short shotgun was found underneath a couch in the living room. "Short shotgun shall mean a shotgun having a barrel or barrels less than eighteen inches long or an overall length of less than twenty-six inches." Neb. Rev. Stat. § 28-1201(6) (Reissue 1979). The short shotgun in this case was a Savage Model 220, single-barrel, .12-gauge shotgun with a 12½-inch barrel and an overall length of 21½ inches.

On August 20, 1980, the appellant Traxler purchased from Cabela's Sporting Goods in Sidney a standard-length Savage Model 220, single-barrel, .12-gauge shotgun. The uncontroverted testimony of Larry Walker, a friend of the appellant, revealed that Walker and Traxler had planned to use the gun to rob drug dealers who, according to Walker, had "burnt him [Traxler] on some stuff down in Colorado." Walker further testified that Traxler was responsible for the cutting, filing, and taping of the gun, although Walker had helped steady the gun while Traxler sawed. Contrary to this testimony, the appellant's brother, David Traxler, who was present at the time the gun was shortened, testified it was Walker who started to cut the shotgun. But the brother later refers to the cutting process as a joint effort. It is clear from the record that the appellant was integrally involved in the preparation of the short shotgun, and, in any case, it is possession, not the manufacture, of the short weapon which is germane to the statutory offense.

While the finishing touches were being placed on the altered weapon, the police arrived with a warrant for Walker's arrest on a charge unrelated to this appeal. Walker momentarily evaded the police, but was soon arrested, leaving the gun in the appellant's custody. David Traxler testified the appellant directed another brother, John, to dispose of the weapon. However, Robin Plunkett, a witness for the defense, claimed he found the short shotgun in a box while helping the appellant

move to the residence at 928 7th Avenue on August 20, 1980, the same day appellant purchased the gun from the sporting goods store. Plunkett also claimed it was he, Plunkett, who placed the gun under the couch without anyone else's knowledge.

As was earlier stated, the only issue appellant raises in this appeal concerns the constitutionality of this particular search and seizure. The appellant alleges the police went beyond the authority granted in the search warrant to search for drugs and drug paraphernalia, making a general search of the residence for evidence of any crime. A general search for evidence of any crime is prohibited by the fourth amendment to the U.S. Constitution and article I, § 7, of the Constitution of Nebraska, both of which provide that probable cause be shown before the search may occur.

In support of his position, the appellant urges that two of the police officers executing the warrant made statements in the record from which it could be inferred that a general search was being made. Even if it be assumed that the statements could change the nature of the search from a valid search under warrant to a general search, it is clear from an examination of the record of the suppression hearing that the evidence warranted the trial judge's arrival at a different conclusion as to what the officers were saying. Their testimony very clearly states that they were searching for drugs and drug paraphernalia only and were not searching for or expecting to find anything else. The appellant takes their statements out of context. One officer's statement admitting he made a general search and the other officer's statement admitting he was looking for "anything else that he could find" would seem simply to refer to the thoroughness of the search throughout the entire house, a thoroughness which would be necessitated and expected in a hunt for drugs. We are bound by the trial judge's factual determinations. As was stated in *State v. Waits*, 185 Neb. 780, 786-87, 178 N.W.2d 774, 779 (1970), "'The search must be one

directed in good faith toward the objects specified in the warrant or for other means and instrumentalities by which the crime charged had been committed. It must not be a general exploratory search through which the officers merely hope to discover evidence of wrongdoing.'" Evidence exists in the record to support the finding that the search and seizure in this case was conducted in good faith and did not amount to a general exploratory search.

The appellant further relies upon the case of *State v. Tara Enterprises, Inc. and Zachary Productions, Ltd.*, 202 Neb. 260, 274 N.W.2d 875 (1979); however, the issue in that case is not relevant to the case at bar. In *Tara Enterprises*, this court held that legally seized items specifically authorized in a warrant would not be suppressed because police had seized other items outside the authorized scope. The appellant is concerned with the suppression of evidence *not* specifically authorized in the warrant.

Finally, the appellant argues that in order for a warrant to be valid it must describe with particularity the item to be seized. The appellant relies upon the following: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. "A warrant shall issue only on affidavit sworn to before the judge or magistrate and establishing the grounds for issuing the warrant. If the judge or magistrate is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property to be seized and naming or describing the person or place to be searched." Neb. Rev. Stat. § 29-814 (Reissue 1979). "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and

seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized." Neb. Const. art. I, § 7. The appellant concedes the warrant was valid for the search and seizure of drugs and drug paraphernalia, but complains it did not authorize the seizure of the gun. Granted, the warrant in this case did not specifically describe and authorize the search and seizure of weapons, but the appellant has failed to recognize the application of the "plain view" doctrine to this situation. "'An example of the applicability of the "plain view" doctrine is the situation in which the police have a warrant to search a given area for specified objects, and in the course of the search come across some other article of incriminating character.'" *State v. King*, 207 Neb. 270, 277-78, 298 N.W.2d 168, 172 (1980), citing *Coolidge v. New Hampshire*, 403 U.S. 443, 465, 91 S. Ct. 2022, 29 L. Ed 2d 564 (1971). As Mr. Justice Stewart stated in *Coolidge*, "What the 'plain view' cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused." 403 U.S. at 466. Therefore, the significant question in cases such as these is whether the police were justifiably present at the searched premises. Even the appellant in his brief admits the affidavit and warrant were adequate to permit the police entrance into his residence. The fact that the weapon was not specifically described in the warrant is irrelevant when the police discovered it during a permissible search. "'When officers, in the course of a bona fide effort to execute a valid search warrant, discover articles which, although not included in the warrant, are reasonably identifiable as contraband, they may seize them whether they are initially in plain sight or come into plain sight subsequently, as a result of the officers' efforts.'" *State v. Waits*, 185 Neb. 780, 787, 178 N.W.2d 774, 779 (1970). As such, we find

the conviction and sentence are affirmed.

AFFIRMED.

CHARLES ALFORD, APPELLANT, V.
LIFE SAVERS, INC., APPELLEE.

315 N.W.2d 260

Filed January 22, 1982. No. 44439.

Employment Contracts: Termination of Employment. When the employment is not for a definite term, and there are no contractual or statutory restrictions upon the right of discharge, an employer may lawfully discharge an employee whenever and for whatever cause he chooses, without incurring liability.

Appeal from the District Court for Seward County: BRYCE BARTU, Judge. Affirmed.

Souchek & Kimble for appellant.

Blevens, Blevens & Jacobs for appellee.

Submitted without oral argument. KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

PER CURIAM.

The plaintiff appeals from an order dismissing the amended petition after a demurrer to the amended petition had been sustained.

The amended petition alleged that the plaintiff had been employed by the defendant as a salesman. On February 2, 1978, the plaintiff's employment was terminated by his supervisor, an employee of the defendant, allegedly without notice and without cause. The amended petition further alleged that the defendant was negligent in failing to exercise proper supervision and control over the plaintiff's supervisor; in failing to ascertain whether the reasons given for the termination of the plaintiff's employment were truthful; in failing to

ascertain whether the termination of the plaintiff's employment violated company policy; in failing to ascertain whether a valid reason existed for termination of the plaintiff's employment; and in failing to ascertain whether the plaintiff's supervisor properly carried out his duty as supervisor. The plaintiff prayed for damages in the amount of $31,815.

There is no allegation in the petition that the plaintiff had any right of continued employment. When the employment is not for a definite term, and there are no contractual or statutory restrictions upon the right of discharge, an employer may lawfully discharge an employee whenever and for whatever cause he chooses, without incurring liability. *Mau v. Omaha Nat. Bank*, 207 Neb. 308, 299 N.W.2d 147 (1980). See, also, *Stewart v. North Side Produce Co.*, 197 Neb. 245, 248 N.W.2d 37 (1976).

The amended petition failed to state a cause of action and was subject to demurrer. The judgment dismissing the amended petition is affirmed.

AFFIRMED.

NEMAHA NATURAL RESOURCES DISTRICT, APPELLEE, V. ELMER NEEMAN, ALVIN PETERSON, AND WALTER REIMER, TRUSTEES, APPELLANTS.

315 N.W.2d 619

Filed January 29, 1982. No. 43480.

1. **Equity: Appeal and Error.** Actions in equity on appeal to this court are triable de novo. However, when credible evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite.
2. **Words and Phrases: Natural Resources Districts.** The term "a majority of the supervisors," as found in Neb. Rev. Stat. § 2-1519 (Reissue 1974), as applied to this case means a majority of all the supervisors of the Otoe Soil and Water Conservation District board of supervisors.

3. **Parliamentary Law.** An abstention in voting is not counted as an affirmative vote in determining whether or not a particular matter or proposition has received the required number of votes.
4. **Actions: Property: Limitations of Actions.** A suit to quiet the title to real estate is an action for the recovery of real property within the statute of limitations applying to such an action.
5. ____: ____: ____. An action for the recovery of title or possession of lands, tenements, or hereditaments can only be brought within 10 years after the cause of action shall have accrued. Neb. Rev. Stat. § 25-202 (Reissue 1979).
6. **Property: Conveyances: Trusts.** When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee.
7. ____:____:____. A constructive trust is a relationship, with respect to property, subjecting the person who holds title to the property to an equitable duty to convey it to another on the ground that his acquisition or retention of the property would constitute unjust enrichment.
8. **Limitations of Actions: Trusts.** The statute of limitations does not begin to run against the rights of the beneficiaries of such a constructive trust until they are apprised of the fact that the trustee does not intend to carry out the provisions of the trust.
9. **Actions: Property: Limitations of Actions.** The following actions can only be brought within 4 years: (2) an action for taking, detaining, or injuring personal property, including actions for the specific recovery of personal property. Neb. Rev. Stat. § 25-207 (Reissue 1979).

Appeal from the District Court for Otoe County: RAYMOND J. CASE, Judge. Affirmed.

Wellensiek & Rehmeier for appellants.

Steven G. Seglin of Crosby, Guenzel, Davis, Kessner & Kuester for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

BRODKEY, J.

This is an equitable action brought by the Nemaha Natural Resources District (Nemaha), a political subdivision of the state, against Elmer Neeman, Alvin Peterson, and Walter Reimer, seeking the return of certain real and personal property conveyed to them on June 30, 1972, by the Otoe Soil and Water Conserva-

tion District (Otoe). Following a trial on December 10, 11, and 21, 1979, the District Court of Otoe County, Nebraska, entered a judgment in favor of the plaintiff, quieting title to the real property in Nemaha and finding that the personal property was the property of the natural resources district. We affirm.

The facts relevant to this case involve the Nebraska natural resources district act, Neb. Rev. Stat. §§ 2-3201 et seq. (Reissue 1977), and the antecedent Soil Conservation Districts Law, Comp. Stat. §§ 2-1901 et seq. (Supp. 1937). In 1937 the Nebraska Legislature enacted the Soil Conservation Districts Law under which conservation districts were created for the purpose of conserving soil resources by controlling and preventing soil erosion through uniform land-use programs. On April 15, 1941, the Otoe Soil Conservation District filed an application for organization with the Secretary of State in accordance with §§ 2-1901 et seq. The Otoe district was subsequently organized, with its principal office in Syracuse, Nebraska, and was governed by a five-member board of supervisors. In 1957 the name of the Otoe Soil Conservation District was changed to the Otoe Soil and Water Conservation District, pursuant to Neb. Rev. Stat. § 2-1549 (Reissue 1970).

The natural resources district act, originally enacted in 1969, provided that the original soil and water conservation districts should be consolidated and made functions of natural resources districts before July 1, 1972; and § 2-3206 of that act further provided that each natural resources district established pursuant to the act "shall assume, on July 1, 1972, all assets, liabilities, and obligations of any soil and water conservation district . . . whose territory is included within the boundaries of such natural resources district." That section also provided that when the jurisdiction of any soil and water conservation district, etc., is included within two or more natural resources districts, "the commission shall determine the apportionment of any assets, liabilities, and obligations. Such ap-

portionment shall be based on the proportionate land area included in each district. Physical assets attached to the land shall be assumed by the district in which they are located."

It appears that until 1969, conservation districts did not have statutory authority to borrow money. There is evidence in the record, however, that as early as 1945 Otoe borrowed money to purchase equipment for conservation projects. There is in the record, however, testimony of various members of the Otoe board of supervisors that it was their practice to borrow money from banks to obtain funds for the purchase of various real and personal property used by the district. There is testimony from some of the supervisors that the money was borrowed by them individually by signing notes at the bank; however, there is also evidence in the record from which a conclusion can be reached that the bank or banks were actually making the loan or loans to the district itself, although such loans were made upon the signatures of the individual supervisors. The loan instruments themselves were not introduced in evidence and are not included in the record, and it is impossible to state with certainty whether the individuals were in effect signing as guarantors of the loan to the district. It is clear, however, that none of the supervisors were ever required personally to make any payments upon the loans obtained by them from the bank; but, on the contrary, the record reveals that the loans were repaid by checks drawn on the Otoe district with funds obtained from the performance of soil conservation services on which the equipment purchased was used.

The real estate involved in this litigation consists of Lots 4, 5, 6, 7, 8, and 9, Block 8, Thorn's Addition to the City of Syracuse, Otoe County, Nebraska. The property was purchased in 1946, and by the mid-1960s an office building was built on the property at a cost of approximately $20,000. The U.S. Department of Agriculture Soil Conservation Service occupies the property

as tenant. The personal property subject to this action includes a dry photocopier, movie projector and screen, measuring wheels, 22-foot fiberglass rods, Rolla-Flex card index file, camera, duplicator, fiberglass tanks with saddles, sheepsfoot roller, three-ton four-wheel trailer, one-ton truck with mounted sprayer and motor and tank, two-wheel sprayer, tree planter, and a humidifier.

After the enactment of the natural resources district act in 1969, the Otoe Soil and Water Conservation District was included within the boundaries of both the Nemaha Natural Resources District and the Lower Platte South Natural Resources District. The evidence in the record indicates that 91 percent of Otoe was assumed by Nemaha, while 9 percent, or 56 square miles, was within the Lower Platte South boundary.

The record reveals that at approximately 10:30 p.m. on June 30, 1972, the evening prior to the statutory merger of Otoe with the Nemaha and Lower Platte South Natural Resources Districts, three members of the Otoe board of supervisors met and conveyed the above-described property to the defendants as trustees. A copy of the trust agreement executed that evening provides in pertinent part:

"WHEREAS when the above described real estate and personal property was purchased title was taken in the name of OTOE SOIL CONSERVATION DISTRICT AND Otoe Soil Conservation District has been holding said property in trust for the benefit of the citizens in Otoe County, Nebraska, interested in soil and water conservation, and

"WHEREAS, the Otoe Soil Conservation District is being dissolved by operation of law and the Nemaha Natural Resources District is being created as a successor and includes the area encompassed in the Otoe Soil Conservation District, and

"WHEREAS, the Otoe Soil Conservation District has been holding title to said property in trust for the benefits of the individuals and residents of Otoe County,

Nebraska, who are interested in soil and water conservation in Otoe County, Nebraska, and it is the desire to place said title in trust for the benefit of soil and water conservation in Otoe County, Nebraska.

"NOW THEREFORE, in consideration of the mutual promises, the Otoe Soil Conservation District in consideration of the premises hereby conveys and transfers the above-described real estate and personal property to Elmer Neeman, Alvin Peterson, and Walter Reimers, in trust, to be held and applied for the promotion of the soil and water conservation in Otoe County, Nebraska, to be known as the 'Otoe County Conservation Trust' . . . ."

The record further discloses that the Otoe board of supervisors met again on July 3, 1972, 3 days after the statutory merger of Otoe with the natural resources districts, and at which time the conservation district was no longer in existence. The minutes of that meeting reveal that all five members of the board were present and voted to approve the minutes of the June 30, 1972, meeting. The deed to the real estate was not filed by the defendants until April 29, 1974. The Nemaha and Lower Platte South Natural Resources Districts filed an assumption affidavit with the register of deeds of Otoe County on October 5, 1972, in order to perfect their claim to the assets assumed from Otoe effective July 1, 1972.

Don Hood, who became manager of Nemaha in 1976, testified that he reviewed the minutes of the natural resources district and determined that Nemaha was not apprised of the fact that it had not assumed the assets of Otoe until January 16, 1975. In August of 1976 Hood met with the defendants and requested a transfer of the assets to Nemaha. At that time the defendants transferred certain items of personal property, to wit: the one-ton truck, two-wheel sprayer, tree planter, and a camera. They refused, however, to transfer the real estate or the balance of the personal property. Thereafter, the board of directors of Nemaha authorized

Hood to seek legal assistance and take the steps necessary to resolve the matter.

On August 23, 1977, Nemaha filed its petition with the Otoe County District Court; however, service on the defendants was not obtained until March 8, 1978. The plaintiff's second amended petition alleged four causes of action: (1) A quiet title action seeking the removal of a cloud cast upon title to the real property alleged to be vested in Nemaha; (2) An action for conversion seeking the return of certain personal property; (3) An action for the imposition of a constructive trust on real property wrongfully conveyed to the defendants; and (4) An action for the imposition of a constructive trust on personal property wrongfully held by the defendants.

On May 16, 1979, the Lower Platte South Natural Resources District executed an assignment to Nemaha of its interest in the real and personal property, and also its interest in the litigation.

In their answer and cross-petition, filed on June 25, 1979, the defendants alleged that Nemaha's second amended petition failed to state a cause of action; that the action was barred by a 4-year statute of limitations; that the Nemaha district had no authority to bring the action; that there was a defect of parties plaintiff in that the Lower Platte South district was not joined in the action; that the Otoe district was a private entity and that Nemaha had no claim to the property by virtue of a statutory merger of Otoe into the Nemaha district; and that the statutes authorizing the natural resources districts are unconstitutional in that they cause unequal taxation within the districts.

This matter came on for trial on December 10, 11, and 21, 1979. In its memorandum opinion filed on February 26, 1980, the trial court determined that the statute of limitations had not run against the claim of Nemaha; that the Lower Platte South district was not a necessary party to the action since it had assigned its interest in the action to Nemaha; that the action of the two supervisors of Otoe in voting to transfer the real

and personal property of the district to the defendants was void, as it was beyond the power of the supervisors to transfer title to property owned by a governmental subdivision to a private entity; that there was not a concurrence of the majority of supervisors to such transfer of assets; and that there was no consideration for the transfer of the property.

The defendants have appealed from the judgment of the District Court, and in their brief on appeal assign the following errors: (1) The trial court erred in ruling that the statute of limitations did not bar the causes of action and that there was no defect of parties plaintiff; (2) The court erred in finding that plaintiff has been acting as a tenant of the trustees; (3) The court erred in failing to find that the Otoe district was a private entity doing business under the firm name of Otoe Soil Conservation District rather than a political subdivision of the state; (4) The court erred in finding Neb. Rev. Stat. § 2-1519 (Reissue 1974) required a concurrence of a majority of all the members of the Otoe board of supervisors; (5) The court erred in finding that the action of only two supervisors in voting to transfer the assets of Otoe was void; (6) The court erred in finding that the subsequent meeting of the Otoe board of supervisors on July 3, 1972, purporting to approve the minutes of the June 30, 1972, meeting was void; (7) The court erred in finding that there was no consideration for the transfer of the property; (8) The court erred in refusing evidence offered for the purpose of providing unconstitutional taxation by the plaintiff; and (9) The court erred in overruling the motion for new trial.

To begin our discussion of the law applicable to the instant case, we note that the standard of review by this court in equity cases is well established. "Actions in equity on appeal to this court are triable de novo, subject, however, to the rule that when credible evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed

the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite." *State v. Jones*, 202 Neb. 488, 493, 275 N.W.2d 851, 854 (1979). See, also, *Botsch v. Leigh Land Co.*, 205 Neb. 401, 288 N.W.2d 31 (1980); *Engel v. Rhen Marshall, Inc.*, 206 Neb. 265, 292 N.W.2d 307 (1980); *Sullivan v. Hoffman*, 207 Neb. 166, 296 N.W.2d 707 (1980).

We reject as fallacious defendants' contention that the Otoe Soil Conservation District existed as a private entity rather than a political subdivision of the State of Nebraska prior to the formation of the natural resources districts in 1972. As we have discussed above, the Otoe conservation district was organized and certified to exist in accordance with the former Soil Conservation Districts Law, §§ 2-1901 et seq., and the subsequent amendments to that law. We also note that at the time of trial, counsel for the defendants stipulated to the fact that the Otoe conservation district was a political subdivision of the state. Accordingly, we determine that the defendants' claim is clearly erroneous and merits no further discussion.

We next consider whether the actions taken by the Otoe board of supervisors on June 30, 1972, were sufficient to transfer the assets of the conservation district to the defendants in trust. In this regard, we note that § 2-1519 was still in effect at the time the board of supervisors attempted to transfer the assets of the conservation district. Section 2-1519 provides in relevant part: "A majority of the supervisors shall constitute a quorum and the concurrence *of a majority of the supervisors* shall be required for the determination of any matter within their duties." (Emphasis supplied.) The issue which has arisen on appeal is whether the actions of the board of supervisors were supported by the requisite majority.

The evidence in the record reveals that the Otoe Soil and Water Conservation District had a meeting which was held on the evening of June 30, 1972, the evening

prior to the statutory merger of the district with the newly created natural resources districts. Present at the meeting were Vernon Niebuhr, chairman of the board, Paul Antes, and Melvin Kuhlenengel, each being a supervisor of the district. It appears the supervisors discussed the transfer of the conservation district's building, real estate, and other equipment into a trust for the people of Otoe County, Nebraska. A vote was taken, with Antes and Kuhlenengel voting in favor of the transfer, and the chairman abstaining. This vote was repeated upon subsequent motions made to sign the documents pertaining to the asset transfer and the appointment of the defendant trustees.

In their brief on appeal, the defendants contend that a simple majority of a quorum is all that was required under § 2-1519 in order for the supervisors to conduct business. We do not agree with the defendants' construction of the statute. In *Houser v. School Dist. of South Sioux City*, 189 Neb. 323, 202 N.W.2d 621 (1972), this court resolved a similar claim which arose over the meaning of the phrase "a majority of the members of the board," as found in Neb. Rev. Stat. § 79-1254 (Reissue 1976). In that case, the court was faced with the question as to whether the phrase meant a majority of the legally constituted quorum of the board, or a majority of all the members elected to the board. In its analysis, the court recognized that in the absence of a contrary statutory provision, the common-law rule applies that a majority of a quorum which constitutes a simple majority of a collective body may act for that body. *FTC v. Flotill Products*, 389 U.S. 179, 88 S. Ct. 401, 19 L. Ed. 2d 398 (1967). The court also found, however, that special provisions of a statute in regard to a particular subject will prevail over general provisions in the same or other statutes, so far as they are in conflict. See, *Albertson v. The State*, 9 Neb. 429, 2 N.W. 742 (1879). The court in *Houser* held that § 79-1254, which contained the phrase "a majority of the members of the board," was a specific statutory provi-

sion applicable to the voting on teachers in Class I, II, III, and VI districts, and concluded it took precedence over the common-law rule. "We see no distinction between the phrasing 'a majority of all members,' and 'a majority of members.' . . . The language used indicates to us the intention to require a majority of all members of the board, and not a majority of the quorum." *Id.* at 328, 202 N.W.2d at 624.

In the instant case, we determine that the phrase "the concurrence of a majority of the supervisors" must be interpreted to mean a majority of all the supervisors of the Otoe conservation district board. Section 2-1519 was a specific statutory section which was enacted by the Legislature to govern actions taken by conservancy district supervisors. Section 2-1519 defines a quorum as a majority of the supervisors, but specifically provides that "the concurrence of *a majority of the supervisors* shall be required for the determination of any matter within their duties." (Emphasis supplied.)

We determine that if only a simple majority of the quorum had been intended to control the action taken by the entire board of supervisors, there would be no need to insert the language "of the supervisors" into the statute. We must conclude that the Legislature did so for the purpose of preventing the common-law rule from applying and to require that a majority of all the members of the board of supervisors vote on the matters before the district board.

We also reject the defendants' contention that the abstention by Chairman Niebuhr must be counted as an affirmative vote in favor of the transfer of the district's assets. We find no specific authorization in the soil and water conservation districts law which would allow an abstention vote to be counted as an affirmative vote. Rather, § 2-1519 clearly provides that the vote of a majority of all the supervisors is required in order to constitute legal action by the board. See, also, Annot., 63 A.L.R.3d 1072 (1975), where the annotator states at 1079: "A substantial number of states have enacted

statutes which expressly require, or which have been construed as requiring, that action by a [government body] shall only be taken upon the majority vote of the total original number of council members, and in dealing with such provisions quite a few courts have inclined to the view that at least one purpose for their enactment was to insure that council action should not be taken save and except upon the actual, affirmative votes of such a majority. Such courts have usually held, therefore, that abstentions should not be considered or counted as affirmative votes in determining whether or not a particular matter or proposition has received the required total."

We find the defendants' arguments to be without merit and determine that the attempted transfer of the property to the trustees was void because it lacked the concurrence of a majority of the Otoe board of supervisors. We also determine that title to the property vested in Nemaha on July 1, 1972, by operation of law in accordance with § 2-3206. Since the Otoe conservation district had been formerly dissolved by statute on July 1, 1972, and had been merged with the natural resources districts, the subsequent meeting of the Otoe supervisors on July 3, 1972, did not effectuate a transfer of the district's assets to defendant trustees.

We next consider the defendants' contention that the present action must fail because the applicable statute of limitations had run prior to the time that Nemaha filed its petition. In this regard we note that Nemaha's first cause of action seeks to quiet title to the aforementioned real property in the natural resources district. In its second cause of action, Nemaha alleges that the defendants have wrongfully refused to return the balance of the personal property to the natural resources district and that the trustees have wrongfully converted such property to their own uses, to the detriment of Nemaha. In its third cause of action, Nemaha seeks the imposition of a constructive trust upon the assets retained by the defendants for the benefit of the

natural resources district.

With regard to Nemaha's action to quiet title to the real estate, we determine that the applicable statute of limitations is Neb. Rev. Stat. § 25-202 (Reissue 1979). Defendants contend in their brief on appeal that since the plaintiff's action with regard to the real estate was a quiet title action, a different statute of limitations should apply than the regular statute of limitations to recover real property. We disagree with that contention. The rule is well established that a suit to quiet title is an action for the recovery of real property within the statute of limitations applying to such an action. 53 C.J.S. *Limitations of Actions* § 36 (1948). The facts of this case clearly establish this action as one for the recovery of the real property under § 25-202, which provides in part: "An action for the recovery of the title or possession of lands, tenements or hereditaments . . . can only be brought within ten years after the cause of action shall have accrued . . . ." Since this action was commenced in 1977, and the cause of action accrued at the earliest on June 30, 1972, it is clear that the action was commenced by the plaintiff well within the period prescribed by the statute of limitations.

Nemaha also seeks to recover the property, both real and personal, which was wrongfully conveyed to the defendants, by means of the imposition of a constructive trust upon such property retained by the trustees. Under the facts presented in this case, there can be little doubt but that the trustees wrongfully acquired and retained the real and personal property that was to be assumed by the Nemaha and Lower Platte South Natural Resources Districts as provided in § 2-3206. We determine that a constructive trust arose for the benefit of the natural resources districts. In *Kuhlman v. Cargile*, 200 Neb. 150, 156-57, 262 N.W.2d 454, 458-59 (1978), this court stated: "Actions to declare a resulting or constructive trust are in equity. See, Marco v. Marco, 196 Neb. 313, 242 N.W.2d 867 (1976); Carey v. Humphries, 171 Neb. 578, 107 N.W.2d 20 (1961); Re-

statement, Restitution, § 160, p. 640. . . . When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee. Campbell v. Kirby, 195 Neb. 610, 239 N.W.2d 792 (1976). A constructive trust is a relationship, with respect to property, subjecting the person who holds title to the property to an equitable duty to convey it to another on the ground that his acquisition or retention of the property would constitute unjust enrichment. See, Jenkins v. Jenkins, 151 Neb. 113, 36 N.W.2d 637 (1949); Restatement, Restitution, § 160, p. 640; Nelson v. Rasmussen, 164 Neb. 274, 82 N.W.2d 418 (1957). 'A constructive trust is imposed to do equity and to prevent unjust enrichment.' Vogt v. Town & Country Realty of Lincoln, Inc., 194 Neb. 308, 231 N.W.2d 496 (1975). Each case involving the existence of a constructive trust is to be determined on the peculiar facts, circumstances, and conditions presented therein. Jenkins v. Jenkins, *supra*."

In their brief on appeal, the defendants contend that the statute of limitations for bringing an action to impose a constructive trust is 4 years, which period is computed from the time that the party bringing the action knew or should have known of the act or acts complained of. The defendants contend that since the act complained of occurred on June 30, 1972, more than 4 years had elapsed before the plaintiff instituted this action on August 23, 1977. Defendants, therefore, argue that the present cause of action was not commenced within the applicable period prescribed in the statute of limitations.

In *Wiseman v. Guernsey*, 107 Neb. 647, 657, 187 N.W. 55, 59 (1922), this court stated as follows: "The statute of limitations does not begin to run against the rights of the beneficiaries of such a constructive trust until they are apprised of the fact that the trustee did not intend to carry out the provisions of the trust. In this case, they were not apprised of that fact until the

trustee repudiated it. The statute of limitations, therefore, had not run against the claim of the defendants."

The record in this case discloses the fact that the Nemaha Natural Resources District did not become apprised of the conveyance of the property to the defendants or of the trustees' intent not to return the property until 1975 and 1976. Don Hood, manager of the natural resources district, testified that he reviewed all of the minutes of Nemaha for the purpose of determining when the district was first notified that the real and personal property had been conveyed to the trustees. The record discloses that the first discussion as to the conveyance of the assets occurred on January 16, 1975. Furthermore, Hood testified that he met with the defendants in August of 1976 for the purpose of recovering the real and personal property. At this time the trustees refused to convey the real property and certain items of the personal property. In any event, we are able to determine that the natural resources district first became apprised of the conveyance on January 16, 1975.

It appears that Neb. Rev. Stat. § 25-207 (Reissue 1979) is the applicable statute of limitations with regard to the establishment of a constructive trust on personal property. Section 25-207 provides in pertinent part: "The following actions can only be brought within four years: . . . (2) an action for taking, detaining or injuring personal property, including actions for the specific recovery of personal property . . . ." Based on the facts of this case and our holding in *Wiseman v. Guernsey, supra,* we determine that, at the earliest, Nemaha was not apprised of the conveyance or of the defendants' intention not to return the assets until January 16, 1975. The action by Nemaha for the imposition of a constructive trust on the personal property was commenced on August 23, 1977, well within the 4-year statute of limitations.

Defendants also contend that the statute creating the natural resources districts is unconstitutional because

it results in unconstitutional inequality of taxation. It is to be noted, however, that the defendants did not argue this issue in their oral presentation to this court, nor is there anything in the record to indicate that a copy of the brief assigning this issue was served on the Attorney General within 5 days of the filing of the brief in the Supreme Court. See Neb. Ct. R. 8.a.2.(3) and 18 (Rev. 1977). This being so, the issue is not properly before us. We also determine that defendants' remaining assignments of error are without merit.

Accordingly, we conclude that the attempted conveyance of the assets of the Otoe Soil and Water Conservation District to the defendant trustees was void. Equity requires that a constructive trust be imposed on the personal property in the possession of the defendants until such time as it is returned to Nemaha. We also quiet title to the real property in question in the Nemaha Natural Resources District. The defendants have no right to own or retain, as individuals or trustees, the real and personal property held under the purported trust agreement, and to allow them to retain said assets would amount to an unjust enrichment. For the reasons stated herein, the judgment of the District Court must be, and hereby is, affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CAREY DEAN MOORE, APPELLANT.

316 N.W.2d 33

Filed January 29, 1982. No. 43557.

1. **Constitutional Law: Death Penalty.** The death penalty is not per se cruel and unusual punishment in violation of the eighth and fourteenth amendments to the Constitution of the United States and article I, §§ 3 and 9, of the Bill of Rights of the Constitution of Nebraska.
2. **Constitutional Law: Aggravating and Mitigating Circumstances: Death Penalty: Sentences.** Neither the Constitution of the United

States nor the Constitution of Nebraska requires determination by a jury of the applicability of the aggravating and mitigating factors in determining under the provisions of Neb. Rev. Stat. §§ 29-2522 and 29-2523 (Reissue 1979) whether the penalty shall be death or life imprisonment, and the provision of determination of the penalty by the trial judge or a panel of judges after notice and hearing is constitutional.

3. **Constitutional Law: Aggravating and Mitigating Circumstances: Words and Phrases.** The definitions of aggravating circumstances in Neb. Rev. Stat. § 29-2523 (Reissue 1979) are not too broad or vague and will be given a narrow construction and narrow application, and as so construed and applied are constitutional.
4. **Criminal Defendants: Homicide: Words and Phrases.** A state of mind of the accused which indicates a callous disposition to repeat the crime of murder manifests exceptional depravity by ordinary standards of morality and intelligence within the meaning of Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1979).
5. **Criminal Defendants: Homicide.** A substantial history of serious assaultive or terrorizing criminal activity includes a previous premeditated murder.
6. _____:_____. The fact that a murder is committed to conceal the identity of the perpetrator of a robbery satisfies the requirements of Neb. Rev. Stat. § 29-2523(1)(b) (Reissue 1979).
7. **Criminal Defendants: Aggravating and Mitigating Circumstances: Sentences.** Neb. Rev. Stat. § 29-2523 (Reissue 1979) does not limit in any way the mitigating factors or circumstances which the court may consider, and the sentencing court should be liberal in admitting evidence of facts which the convicted defendant asserts are mitigating factors.
8. **Constitutional Law: Aggravating and Mitigating Circumstances: Proof.** Neither the Constitution of the United States nor the Constitution of the State of Nebraska requires the prosecution to prove the absence of mitigating factors.
9. **Constitutional Law: Death Penalty: Sentences.** Neb. Rev. Stat. §§ 29-2520 and 29-2522 (Reissue 1979) are not unconstitutional because the sentencing hearing may be held and the sentence may be imposed either by the trial judge or a sentencing panel consisting of the trial judge and two other district judges.
10. **Death Penalty: Sentences.** The imposition of the death sentence in this case is justified by the application of the standards provided by Neb. Rev. Stat. § 29-2523 (Reissue 1979), as interpreted and limited by the definitions of this court.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Stanley A. Krieger for appellant.

Paul L. Douglas, Attorney General, and J. Kirk Brown for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

CLINTON, J.

The defendant, Carey Dean Moore, age 22, was charged with two counts of first degree murder as follows: (1) On August 22, 1979, having killed Reuel Eugene Van Ness, Jr., in the perpetration of or attempt to perpetrate a robbery, and (2) on August 27, 1979, having killed Maynard D. Helgeland in the perpetration of or attempt to perpetrate a robbery. After waiving a trial by jury, defendant was tried by the court and found guilty on both counts. Pursuant to the provisions of Neb. Rev. Stat. §§ 29-2520 et seq. (Reissue 1979), a sentencing hearing was held on May 22, 1980, before a panel of three judges, including the trial judge. On June 20, 1980, the defendant was, on each count, sentenced to the penalty of death by electrocution.

The case has come to this court for automatic review. The defendant assigns the following alleged errors: (1) The Nebraska statutes providing for capital punishment are unconstitutional because the death sentence is per se unconstitutional and prohibited by the eighth and fourteenth amendments to the U.S. Constitution and article I, § 9, of the Bill of Rights of the Nebraska Constitution. (2) Neb. Rev. Stat. §§ 29-2519 through 29-2523 (Reissue 1979), providing the conditions under which the death penalty may be imposed, are unconstitutional because they do not provide for a jury determination of the existence of the aggravating and mitigating circumstances described in the statutes and the appropriateness of the death penalty. (3) Sections 29-2523 et seq. are unconstitutionally vague and indefinite, and appellate interpretation has not removed this ambiguity. (4) The sentencing panel of judges did not properly apply to the evidence in the case the aggravating and mitigating circum-

stances as defined by statute and the interpretations of this court. (5) The panel erred in its review of homicide cases in which the death penalty was not imposed, claimed by the defendant to be similar to the case at bar, because the panel limited its review in accordance with our opinion in *State v. Williams*, 205 Neb. 56, 287 N.W.2d 18 (1979). (6) The death penalty statute is unconstitutional because it limits the mitigating factors which can be considered by the sentencing tribunal. (7) A conviction and sentence in a capital case cannot be sustained unless it appears beyond a reasonable doubt that no error in the factfinding of the trial contributed in any way to the determination of guilt. (8) The statutes are unconstitutional because they do not require the State to prove beyond a reasonable doubt that mitigating factors do not exist. (9) The provision of the statutes providing that the sentencing phase may be heard before either the judge who presided at the trial or before a sentencing panel of three judges, including the trial judge, is unconstitutional because it provides no guidelines for the determination of when the sentencing is to be done by a single judge and by a panel. (10) The sentence of death is excessive and should be reduced to life imprisonment.

We affirm the judgment and sentences.

The defendant did not introduce any evidence during the trial of the case. Therefore, there is no significant conflict on the issue of guilt. The defendant confessed commission of the two killings in taped interrogations by the police, which were introduced in evidence. It is not claimed that these confessions were involuntary.

An outline of the evidence, however, is necessary to a discussion of assignment (4) and in order that we may perform our independent function of determining whether the imposition of this particular death penalty is appropriate under the statutory standards, and to assure the death penalty is not imposed in an arbitrary and capricious manner.

Both of the victims were cabdrivers, and the modus

operandi in each case was similar. About August 20, 1979, the defendant purchased the handgun with which the murders were committed. He acquired the gun by purchasing it from a cabdriver who had pawned the gun. The defendant and the seller went together to the pawnshop where the gun was redeemed, the defendant furnishing the money for the redemption and paying the seller an additional $50. The gun was then test-fired.

We now quote from the findings made by the sentencing panel in its order, which findings are fully supported by uncontroverted evidence: "The defendant's own statements, in his confession to Officers O'Donnell and Thompson while in custody at Charles City, Iowa, indicate that these crimes had been in the planning stage for at least a day or two before the Van Ness homicide. Apparently on the evening prior to the Van Ness murder, the defendant had called a number of cabs from a telephone booth somewhere on Farnam Street in the downtown Omaha area to see how quickly each would respond to his call. The defendant then hid somewhere in the vicinity to await each cab's arrival, at which time he checked the cab to determine whether the driver would be a suitable victim, i.e., not too young, since the defendant stated that it was easier for him to shoot an older man rather than a younger man nearer his own age. On the evening of the Van Ness homicide, the defendant's plan was to call one cab at a time from the Smoke Pit restaurant, and, if the driver who responded 'wasn't too old,' the defendant would just not identify himself as the fare for which the cab had been summoned. When Mr. Van Ness arrived at the Smoke Pit on August 22, 1979, the defendant determined that this was the driver who would be robbed and shot because 'he wasn't too young'.

"A similar pattern of events unfolded on August 26, 1979. The defendant went to the Greyhound Bus depot at 18th and Farnam Streets in Omaha that evening,

and, when he saw a lone cab with an older driver parked at the taxi stand outside the depot, he got into the cab and directed the driver to take him to the Benson area. According to the defendant, this particular cab and driver were selected both because there were no other cabs at the taxi stand at the time, thus decreasing the chances of the defendant's being identified, and because the driver was an older man. The defendant then stated that, as previously discussed, he had planned ahead of time to rob and shoot the driver of whichever cab he selected." In his confessions the defendant stated that he killed each of the victims in order that the victim would not be able to identify him as the robber.

The body of Van Ness was found at Dam Site 16 near Omaha on the morning of August 22, 1979. The body of Helgeland was found in his cab in Omaha about 7:30 a.m. on August 27, 1979. The defendant was positively identified as one of two persons getting into the Van Ness cab at the Smoke Pit restaurant in Omaha earlier that morning. The other person was identified as his younger brother. He was positively identified by fishermen as being in the cab at Dam Site 16 before the slaying, when Van Ness asked directions in order to take the defendant to the place at the dam where he wished to go. The gun, identified by expert witnesses as the one used in the two slayings, was found in the defendant's possession in a stolen automobile when the defendant was apprehended in Iowa on August 29, 1979.

The contention of the defendant that the death penalty is in all circumstances unconstitutional as constituting cruel and unusual punishment has been rejected by the U.S. Supreme Court and this court on a number of occasions. We need not respond to that argument other than citing some of the pertinent precedents. *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976); *Proffitt v. Florida*, 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976);

State v. Rust, 197 Neb. 528, 250 N.W.2d 867 (1977); *State v. Stewart*, 197 Neb. 497, 250 N.W.2d 849 (1977); *State v. Otey*, 205 Neb. 90, 287 N.W.2d 36 (1979); *State v. Anderson and Hochstein*, 207 Neb. 51, 296 N.W.2d 440 (1980); *State v. Harper*, 208 Neb. 568, 304 N.W.2d 663 (1981).

The defendant cites no judicial precedent or constitutional provision supporting a proposition that the U.S. and the Nebraska Constitutions require that, in order that the death penalty may be constitutionally imposed, a jury make the factual determinations pertaining to aggravating and mitigating circumstances. We have expressly rejected that contention in *State v. Simants*, 197 Neb. 549, 250 N.W.2d 881 (1977). We there said at 559, 250 N.W.2d at 888: "As we understand the federal and the state constitutional provisions, they do not require or even suggest that jury sentencing is constitutionally required. Whatever the relative merits of sentencing by a judge or jury may be, we need not consider them. Our concern is the constitutionality of the Nebraska system, under the federal and state Constitutions. The relative merits of the one or the other is for legislative and not judicial determination. We find the sentencing procedure provided by the Nebraska statute does not violate either the Nebraska or the federal Constitution." The U.S Supreme Court has, at least implicitly, rejected the contention that jury determination of the sentence is required. *Proffitt v. Florida, supra.* In that case the Court said in 428 U.S. at 252: "The basic difference between the Florida system and the Georgia system is that in Florida the sentence is determined by the trial judge rather than by the jury. This Court has pointed out that jury sentencing in a capital case can perform an important societal function, *Witherspoon v. Illinois*, 391 U.S. 510, 519 n. 15 (1968), but it has never suggested that jury sentencing is constitutionally required. And it would appear that judicial sentencing should lead, if anything, to even greater consistency

in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases."

The defendant's third contention, asserting that the definitions of aggravating and mitigating circumstances in the statute are so vague and indefinite as to be unconstitutional, has been addressed by this court in a series of cases which refine, clarify, and restrict that definition in response to such arguments. *State v. Simants, supra; State v. Rust, supra; State v. Stewart, supra; State v. Holtan,* 197 Neb. 544, 250 N.W.2d 876 (1977); *State v. Otey, supra; State v. Anderson and Hochstein, supra; State v. Harper, supra.* It is clear that the general scheme of § 29-2523 meets the requirements laid down in *Furman v. Georgia,* 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972). See, *Gregg v. Georgia, supra; Proffitt v. Florida, supra.* We need at this time address only the specific arguments which the defendant makes in this case. The defendant's third, fourth, and fifth assignments overlap and so we will discuss them together.

It is necessary at this time to make some reference to the sentencing panel's order and the findings therein. The panel made a detailed analysis of the evidence, the provisions of § 29-2523, and the decisions of this court interpreting that statute. It considered each statutory provision separately and made factual findings based upon the evidence adduced at trial and at the sentencing hearing by both the State and the defendant. On the basis of that analysis, it made specific findings as to which aggravating and which mitigating circumstances existed in this case, including the applicability of the statutory provisions which are disjunctive.

We will later, where necessary, make reference to the details of that analysis. At this point, it will suffice to quote the panel's summary of affirmative findings.

"The sentencing panel specifically finds that, with regard to the murder of Reuel Van Ness, Jr., aggravating circumstances (b) and (d) have been found to exist beyond a reasonable doubt. By way of clarification, the panel more specifically finds that the second clause of aggravating circumstance (1)(b) (' . . . committed . . . to conceal the identity of the perpetrator') and the latter portion of aggravating circumstance (1)(d) (' . . . manifested exceptional depravity by ordinary standards of morality and intelligence'[)] are applicable in this case.

"With regard to the murder of Maynard Helgeland, the sentencing panel specifically finds that aggravating circumstances (a), (b), and (d) have been found to exist beyond a reasonable doubt. More specifically, the panel finds that the second clause of aggravating circumstance (1)(a) ('The offender . . . has a substantial history of serious assaultive or terrorizing criminal activity') is applicable to the Helgeland homicide, based on the murder four days earlier of Reuel Van Ness, Jr. In addition, the second clause of aggravating circumstance (1)(b) and the latter portion of aggravating circumstance (1)(d) are applicable to the Helgeland homicide, as they were to the Van Ness homicide."

The panel also reiterated generally its previous, more specific findings that none of the statutory mitigating factors existed, but stated that "the family background and upbringing of the defendant are entitled to consideration as a mitigating factor . . . ." It found that factor did not outweigh the aggravating circumstances.

The defendant's claim of vagueness in the statutory language and deficiency in appellate refinement of definition is directed at the language of § 29-2523(1)(d), which states: "The murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence."

The defendant argues that under the holding of the U.S. Supreme Court in *Godfrey v. Georgia*, 446 U.S.

420, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980), the above statutory language, even as limited by the interpretations of this court, is vague and imprecise, thus permitting a standardless imposition of the death penalty. We now turn to an examination of *Godfrey v. Georgia, supra.* Under Georgia law, if the jury finds the defendant guilty, it is instructed by the court at a separate sentencing phase of the trial on the law of aggravating and mitigating circumstances. The jury then recommends a sentence to the court. As part of that recommendation it must specifically state the supporting aggravating circumstance or circumstances which it finds exist beyond a reasonable doubt. The jury in that case found beyond a reasonable doubt "'that the offense of murder was outrageously or wantonly vile, horrible and inhuman.'" 446 U.S. at 426. The trial court accepted the jury's recommendation, and the Supreme Court of Georgia affirmed. The U.S. Supreme Court reversed the judgment insofar as it levied a death penalty.

We now quote from or paraphrase pertinent portions of the *Godfrey* opinion: "Under Georgia law, a person convicted of murder may be sentenced to death if it is found beyond a reasonable doubt that the offense 'was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.' Ga. Code § 27-2534.1(b)(7) (1978). In *Gregg v. Georgia,* 428 U.S. 153, the Court held that this statutory aggravating circumstance (§ (b)(7)) is not unconstitutional on its face. Responding to the argument that the language of the provision is 'so broad that capital punishment could be imposed in any murder case,' the joint opinion said:

"'It is, of course, arguable that any murder involves depravity of mind or an aggravated battery. But this language need not be construed in this way, and there is no reason to assume that the Supreme Court of Georgia will adopt such an open-ended construction.'

[Citation omitted.]" 446 U.S. at 422-23.

In *Godfrey v. Georgia, supra,* the defendant was found guilty and sentenced to death for the murders of his wife and mother-in-law. Briefly, the circumstances of the crimes were that the defendant and his wife were having marital difficulties. When he threatened her with a knife, she left the family home. She commenced an action for divorce, and a court hearing was set. Before the hearing, the defendant, on several occasions, asked his wife to return. At some point during this period she moved in with her mother. The petitioner believed that the mother was actively interfering with a reconciliation. On the day before the crimes, the defendant's wife called him. She said reconciliation was impossible, and allegedly demanded all proceeds from the planned sale of their home. A similar telephone conversation took place about an hour later. The wife at that time allegedly stated that her mother supported her position. The wife then hung up the telephone. Defendant obtained a shotgun and walked to his mother-in-law's trailer home. He saw his wife, mother-in-law, and young daughter playing cards. He fired through a window, killing his wife. He entered the trailer and struck his 11-year-old daughter with the gun barrel and then shot his mother-in-law. Both of the women died instantly from gunshot wounds to the head.

"The issue now before us is whether, in affirming the imposition of the sentences of death in the present case, the Georgia Supreme Court has adopted such a broad and vague construction of the § (b)(7) aggravating circumstance as to violate the Eighth and Fourteenth Amendments to the United States Constitution." 446 U.S. at 423. "In the case before us, the Georgia Supreme Court has affirmed a sentence of death based upon no more than a finding that the offense was 'outrageously or wantonly vile, horrible and inhuman.' There is nothing in these few words, standing alone, that implies any inherent restraint

on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.' Such a view may, in fact, have been one to which the members of the jury in this case subscribed. If so, their preconceptions were not dispelled by the trial judge's sentencing instructions. These gave the jury no guidance concerning the meaning of any of § (b)(7)'s terms. In fact, the jury's interpretation of § (b)(7) can only be the subject of sheer speculation.

"The standardless and unchanneled imposition of death sentences in the uncontrolled discretion of a basically uninstructed jury in this case was in no way cured by the affirmance of those sentences by the Georgia Supreme Court. Under state law that court may not affirm a judgment of death until it has independently assessed the evidence of record and determined that such evidence supports the trial judge's or jury's finding of an aggravating circumstance. Ga. Code § 27-2537(c)(2) (1978)." 446 U.S. at 428-29.

The U.S. Supreme Court then went on to discuss previous opinions of the Georgia Supreme Court interpreting Ga. Code Ann. § 27-2534.1(b)(7) (Rev. 1978) and noted that in those cases the Georgia court had appropriately defined and limited the applications of the § 27-2534.1(b)(7) language. It held that in the *Godfrey* case, the Supreme Court of Georgia had not followed the criteria previously established, and concluded: "Nothing said on appeal by the Georgia Supreme Court indicates that it took a different view of the evidence. The circumstances of this case, therefore, do not satisfy the criteria laid out by the Georgia Supreme Court itself in the *Harris* and *Blake* cases. In holding that the evidence supported the jury's § (b)(7) finding, the State Supreme Court simply asserted that the verdict was 'factually substantiated.'" 446 U.S. at 432. The Court further stated: "The petitioner's crimes cannot be said to

have reflected a consciousness materially more 'depraved' than that of any person guilty of murder. His victims were killed instantaneously. They were members of his family who were causing him extreme emotional trauma." 446 U.S. at 433.

The Court, in n. 15, stated at 432-33: "The sentences of death in this case rested exclusively on § (b)(7). Accordingly, we intimate no view as to whether or not the petitioner might constitutionally have received the same sentences on some other basis. Georgia does not, as do some States, make multiple murders an aggravating circumstance, as such."

In short, the U.S. Supreme Court's vacation of the death sentence in *Godfrey* rested upon: (1) Lack of precise instructions to the jury and impreciseness of the jury's findings. (2) Failure of the Supreme Court of Georgia to follow its own previously established criteria interpreting § 27-2534.1(b)(7). (3) The court's apparent failure to independently review the factual findings of the trial court and jury. (4) As the U.S. Supreme Court noted, the victim was causing the actor "extreme emotional trauma," and the crime was motivated by overwhelming passion. (It should be noted the factual circumstances in *Godfrey* are quite different from the one before us.) (5) The jury was not instructed on the restricted definition of § 27-2534.1 (b)(7), which had been adopted by the Georgia Supreme Court.

The holding of the U.S. Supreme Court in *Godfrey* clearly does not control in the case before us for a number of reasons. First, the sentencing panel in the case at bar made very specific findings by way of meticulous analysis of the evidence and careful application of the statute as well as this court's prior interpretations thereof. The panel is not an uninstructed jury. Second, the imposition of the death penalty in the case before us did not rest wholly upon a finding of the existence of aggravating circumstance (1)(d) of § 29-2523, which we will discuss in

more detail later since it is the heart of the defendant's argument. Instead, the sentence in this case is supported by the existence of several aggravating circumstances completely supported by uncontroverted evidence. Third, the factual circumstances of the murders in our present case are quite different from those in *Godfrey*, as we have discussed earlier. Fourth, this court does, as we hereafter set forth, review and independently confirm the panel's findings. None of the factors leading to reversal in *Godfrey* exist in this case.

We now turn to the defendant's claim of vagueness. The U.S. Supreme Court in *Godfrey* did not overrule its previous holding in *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976). The language of the Georgia statute, § 27-2534.1(b)(7), was not unconstitutional on its face. Aggravating circumstance (1)(d) of § 29-2523 literally, and as interpreted by this court, describes in the disjunctive two separate circumstances which may operate in conjunction with or independent of one another. The first circumstance is that the murder was especially heinous, atrocious, or cruel. We have said that this circumstance is directed to the "pitiless crime which is unnecessarily torturous to the victim" and to cases where torture, sadism, or the imposition of extreme suffering exists. *State v. Stewart*, 197 Neb. 497, 250 N.W.2d 849 (1977); *State v. Rust*, 197 Neb. 528, 250 N.W.2d 867 (1977). In this case the sentencing panel found that aggravating circumstance did not exist. We agree. The second circumstance pertains to the state of mind of the actor. In *State v. Stewart, supra*, we said the second instance indicates a situation "where depravity is apparent to such an extent as to obviously offend all standards of morality and intelligence" (syllabus of the court), and in *State v. Holtan*, 197 Neb. 544, 250 N.W.2d 876 (1977), it indicates a state of mind "totally and senselessly bereft of any regard for human life" (syllabus of the court). The sentencing

panel found the second circumstance did apply. We agree that the following circumstances exhibit a state of mind exceptionally depraved and totally and senselessly bereft of regard for human life: (1) The murders here were coldly planned as a part of the robberies. (2) The evidence clearly supports the conclusion that the murders were to be repetitive, i.e., the defendant intended to continue on his selected course of conduct so long as his needs required. (3) The victims were selected on the basis of certain characteristics which made it easier for the defendant to shoot them, namely, their ages. His unstated conclusion was that a human life in the middle years is less valuable than a younger life.

The sentence in this case does not rest wholly upon the findings with reference to circumstance (1)(d) of § 29-2523. As the sentencing panel found, and as we independently find, additional independent aggravating circumstances exist. In both the Van Ness and the Helgeland murders, the crimes were committed to conceal the identity of the perpetrator. § 29-2523(1)(b). This, Moore acknowledged, was one of his motives for the killings. In the Helgeland murder there existed yet a third aggravating circumstance, a substantial history of violence, as demonstrated by the Van Ness murder a few days earlier. § 29-2523(1)(a). The sentencing panel carefully analyzed this element in accordance with our prior interpretations. *State v. Rust, supra; State v. Holtan, supra.* In *Holtan* we said at 546, 250 N.W.2d at 879: "'History' refers to the individual's past acts preceding the incident for which he is on trial and 'substantial,' . . . refers to an actual, material, and important history of acts of terror of a criminal nature. It does not refer to the particular incident involving the homicide for which he is subject to sentence." See *State v. Perry,* 199 Neb. 656, 261 N.W.2d 95 (1977).

The defendant argues that in imposing the sentence of death, the panel did not apply the provisions of 1978

Neb. Laws, L.B. 711, §§ 29-2519 to 29-2521.04. This argument is founded in part upon the premise that in *State v. Williams*, 205 Neb. 56, 287 N.W.2d 18 (1979), this court did not properly interpret L.B. 711.

The act in question provides in part: "(5) In order to compensate for the lack of uniformity in charges which are filed as a result of similar circumstances it is necessary for the Supreme Court to review and analyze all criminal homicides committed under the existing law in order to insure that each case produces a result similar to that arrived at in other cases with the same or similar circumstances." § 29-2521.01.

"The Supreme Court shall within a reasonable time after July 22, 1978, review and analyze all cases involving criminal homicide committed on or after April 20, 1973. Such review and analysis shall examine (1) the facts including mitigating and aggravating circumstances, (2) the charges filed, (3) the crime for which defendant was convicted, and (4) the sentence imposed. Such review shall be updated as new criminal homicide cases occur." § 29-2521.02.

"The Supreme Court shall, upon appeal, determine the propriety of the sentence in each case involving a criminal homicide by comparing such case with previous cases involving the same or similar circumstances. No sentence imposed shall be greater than those imposed in other cases with the same or similar circumstances. The Supreme Court may reduce any sentence which it finds not to be consistent with sections 29-2521.01 to 29-2521.04, 29-2522, and 29-2524." § 29-2521.03.

"Each district court shall provide all records required by the Supreme Court in order to conduct its review and analysis pursuant to sections 29-2521.01 to 29-2521.04, 29-2522, and 29-2524." § 29-2521.04.

In *State v. Williams*, *supra*, we held that L.B. 711 required this court to review only cases in which the defendant was found guilty of first degree murder, and in *State v. Welsh*, 202 Neb. 249, 275 N.W.2d 54 (1979),

we held that the procedure is applicable in this court only when the death penalty is imposed. The defendant now argues that our reviews have been inadequate, and, in his brief, states: "The concern of the Nebraska Legislature was directed, in part, in insuring that there is uniformity throughout the State in death sentencing. Section 29-2521.01, R.S. Supp. 1978. Obviously, to consider only first-degree murder convictions is to exclude from determination a large group of homicides in which defendants avoided death by being charged with lesser crimes than first-degree murder or by pleading to lesser charges, or by other acts of prosecutorial discretion in interpreting the charging facts. It is a hollow review indeed if these cases are excluded from review. It becomes a cruel facade if a defendant's case is reviewed only against other capital cases and not against lesser homicides which might involve the same or similar circumstances."

In *State v. Williams, supra* at 76, 287 N.W.2d at 29, we said: "To interpret that language of L.B. 711 literally would create insurmountable constitutional problems. In view of the disposition made here, it is unnecessary to discuss constitutional issues." We did not there elaborate on the constitutional problems except to indicate that they relate to the constitutional division of powers between the branches of government, specifically mentioning prosecutorial discretion. The prosecutor is obviously a member of the executive branch of government. We now find it necessary to delineate the reasons why a literal application of L.B. 711 would unconstitutionally encroach upon the judicial function. In so doing, we will define more precisely the limits within which L.B. 711 may constitutionally be applied.

We first state the underlying legal principles and then illustrate their application. Neb. Const. art. II, § 1, provides: "The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or

collection of persons being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted." A similar division of powers, under the U.S. Constitution, is held to exist by implication. Corwin's The Constitution and What It Means Today at 6-7, 204 (14th ed. H. Chase & C. Ducat 1978); *Hampton & Co. v. United States*, 276 U.S. 394, 48 S. Ct. 348, 72 L. Ed. 624 (1928); *Hayburn's Case*, 2 Dall. 409, 2 U.S. 409, 1 L. Ed. 436 (1792).

The separation of powers doctrine imposes restrictions upon the legislative branch to limit the judicial functions of the courts. The Legislature cannot, by subsequent legislation, divest rights which have vested by virtue of a judgment. *City of Wayne v. Adams*, 156 Neb. 297, 56 N.W.2d 117 (1952). It cannot enact legislation to retroactively open or vacate a judgment. *Mooney v. Drainage District, on rehearing* 134 Neb. 192, 278 N.W. 368 (1938), *cert. denied* 305 U.S. 622, 59 S. Ct. 84, 83 L. Ed. 398 (1938). The limits of the jurisdiction conferred upon the Supreme Court by the Constitution may not be increased or extended by legislative enactment. *State ex rel. Wright v. Barney*, 133 Neb. 676, 276 N.W. 676 (1937); *Miller v. Wheeler*, 33 Neb. 765, 51 N.W. 137 (1892); *State v. Hall*, 47 Neb. 579, 66 N.W. 642 (1896). It cannot change procedures established by the Constitution. *State ex rel. v. Ellis*, 156 Or. 83, 66 P.2d 995 (1937). It cannot interfere with the judicial function of adjudicating the fact of an acquittal. *In re Johnston*, 3 Cal. 2d 32, 43 P.2d 541 (1935). It may not reverse a judgment. *Roberts v. The State*, 160 N.Y. 217, 54 N.E. 678 (1899). It may not direct the disposition of a case in which jurisdiction has attached. *State v. Costen*, 141 Tenn. 539, 213 S.W. 910 (1919). It is to be clearly implied from the foregoing principles that the Legislature cannot direct the disposition of one case by the factual determinations in another.

It is apparent from the language of § 29-2521.01(5)

and § 29-2521.02 that the Legislature attempts to impose a mandate upon this court to look behind prosecutorial judgments concerning the charges to be filed, jury verdicts determining the particular degree of homicide, and then, based upon our independent findings of the facts in those adjudicated cases, to determine the penalty in the case before us.

We must examine the constitutional import of the foregoing legislative purpose. In examining prosecutorial discretion we would of necessity have to independently gather evidence. The gathering of evidence is not a judicial function but one of the executive. We would then determine what charges we think should have been filed. Again, this is an executive function of the prosecutor. We would make a judgment about the chances of a conviction as against an acquittal, again an executive function. We would need to weigh the advisability of a plea bargain to secure a conviction on a lesser charge in order to avoid a likely acquittal of all charges. These are all clearly executive and not judicial functions.

It must be borne in mind that not all homicide convictions result in appeals to this court. The following illustrates the Legislature's intrusion into the judicial function under L.B. 711. If a person is charged with murder in the first degree but convicted of a lesser degree of homicide, and if L.B. 711 is to be applied literally, we would then, for purposes of reviewing the case before us, disregard the factfindings of the jury in the so-called "analogous" case. Such a procedure would be constitutionally objectionable for a number of reasons. First, it would require this court to find facts in a case not before it. Secondly, it would constitute an attempt by the Legislature to make the factfindings of one case determinative of the sentence in another case on review. It is plain that under the principles we have earlier cited, that legislation which attempts to achieve such results is an intrusion on the judicial function, contrary to the separation of powers doc-

trine, and thus violates article II, § 1.

Another effect of L.B. 711 would be to unconstitutionally restrict the appellate review powers of this court under Neb. Const. art. I, § 23, as that legislation attempts to bind this court by requiring it to apply sentences imposed in some "analogous" case in a district court. It is clear that applying such a standard would restrict a defendant's right to an independent review by this court under article I, § 23, of the Bill of Rights of our Nebraska Constitution. This section provides: "In all cases of felony the defendant shall have the right of appeal to the Supreme Court; and in capital cases such appeal shall operate as a supersedeas to stay the execution of the sentence of death, until further order of the Supreme Court."

Upon this closer review of L.B. 711, it is clear the Legislature in that act attempts to exercise the judicial function in violation of the Constitution. Sections 2 and 3 of L.B. 711 must be restricted in their application to a comparison in this court of only those cases in which the defendant in the District Court has been convicted of murder in the first degree.

L.B. 711 thus construed is coextensive with our duty under the federal Constitution, under our own state Constitution, and under the statutory provisions for automatic review to determine in the death penalty cases which come before us whether the provisions of § 29-2523 are properly applied, and to assure the death penalty is not arbitrarily and capriciously imposed. *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972); *Godfrey v. Georgia*, 446 U.S. 420, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980); *State v. Simants*, 197 Neb. 549, 250 N.W.2d 881 (1977). We will, of course, continue to make comparisons. Each District Court will continue to furnish to this court, in accordance with our previous administrative order, the records of all convictions of first degree murder not appealed to this court. § 29-2521.04. If either the State or the defendant

wishes to call to the attention of the sentencing judge or sentencing panel, for the purposes of comparison, the facts and sentence in any case of first degree homicide which has not been appealed to this court, it should be done at the sentencing hearing by means of admissible evidence for which proper foundation is laid. This, of course, will mean, in most cases where the fact is not admitted or is challenged, producing the official records or pertinent portions thereof of the case which is to be called to our attention.

At the sentencing hearing in this case the defendant introduced an exhibit related to the case of *State v. Cecil Henry Floyd* in the District Court for Hamilton County, Nebraska. This is one of the unappealed cases reviewed by this court in *State v. Williams*, 205 Neb. 56, 287 N.W.2d 18 (1979). Although not specifically argued, it clearly appears the apparent purpose of introducing the exhibit was to raise the issue of whether an isolated case in which the death penalty perhaps should have been imposed, but was not, becomes the standard which governs all capital cases before this court.

In the exhibit just referred to above is a two-page typewritten summary, obviously prepared by counsel, which among other things contains the following statement: "Source of Information," followed by the name of the prosecutor and defense counsel in that case. The summary otherwise purports to show that Floyd, previous to the Nebraska homicide (felony murder in the course of a robbery), was serving a term of life imprisonment for homicide in Indiana and had pled guilty to three homicides in Florida. We have again reviewed the official transcript of the *Floyd* case. Proof was made in that case of the Indiana conviction only and none of the circumstances of the Indiana case are shown by the record. The only pertinent other evidence adduced at the sentencing hearing was the testimony of the victim's mother, in which she requested the death penalty not be imposed,

and the testimony of the defendant Floyd, in which he stated he had not intended to kill the victim but that the gun discharged in the course of a struggle when the victim attempted to take the weapon away from him. The defendant also recited a history of mental illness.

In the *Floyd* case the sentencing judge, in ruling upon an objection to the presentence investigation report, stated he would take into consideration only those matters therein which were properly before him, i.e., insofar as other murder convictions were concerned, those that were proved by proper evidence and not the hearsay testimony of defense counsel and prosecutor. The sentencing judge did not make detailed findings as to aggravating and mitigating circumstances. He apparently regarded the imposition of the penalty as being within his "discretion." He imposed a sentence of life imprisonment, to be served consecutive to the Indiana life sentence and consecutive to any other sentence the defendant might serve elsewhere, allowing no credit on the Nebraska life sentence for any time served elsewhere. The court directed that the defendant be returned to Indiana and that "holds" be placed by the Indiana sheriff as well as any other states' sheriffs in which the defendant was wanted. It may be that the death sentence should have been imposed in the *Floyd* case had proper proof been made, but such a determination is impossible from the limited record before us. The record showed no competent proof of the alleged Florida homicides or of the circumstances surrounding them. Nor was there any proof of the circumstances surrounding the Indiana case. If the State wishes to prove as an aggravating circumstance a conviction of the defendant in other states, it must do so by authenticated copies of such conviction unless, of course, the fact is admitted.

Our reading of *Godfrey* does not lead us to an understanding that an isolated, unappealed trial court judgment is to be the standard by which all other sentences must be judged. The U.S. Supreme Court's purpose

in that case was to mandate the death penalty not be inflicted arbitrarily and capriciously. The Court imposed upon the states the duty of defining the circumstances under which the death penalty should be imposed in such a way as to obviate "standardless" sentences. Section 29-2523, as interpreted and limited by this court, does afford "specific and detailed guidance" in the imposition of sentence and makes "rationally reviewable the process for imposing a sentence of death." *Godfrey v. Georgia*, 446 U.S. 420, 428, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980).

The defendant argues that the sentencing panel erred in finding that a mitigating factor, to wit, "(2)(a) The offender has no significant history of prior criminal activity," did not exist. The record disclosed that the defendant had one previous felony conviction, auto theft, for which he served a term of 1 to 2 years in the Nebraska Penal and Correctional Complex, and that he admitted having forged approximately $1,100 in checks prior to the crimes involved here. The panel also mentioned that he had a juvenile record of lesser offenses. The defendant argues that "consideration" of the latter was error. We hold that this particular juvenile record should be disregarded. What, if any, offenses in a juvenile record should be considered and under what category of aggravating or mitigating factors will obviously depend upon the nature of the act. Nonetheless, the commission of two felonies cannot support a finding that there is no significant prior criminal history. In any event, this mitigating factor, even if it were said to exist, does not, even when considered with family history, outweigh the aggravating factors.

The records and the convictions since *State v. Williams*, 205 Neb. 56, 287 N.W.2d 18 (1979), which we have reviewed disclose that the standards of § 29-2523 are being carefully applied by the sentencing judge or panel.

The defendant asserts that § 29-2523 is unconstitu-

tional, because it limits the mitigating factors which may be considered in determining sentence. There is no basis for this contention. Section 29-2521 provides in part: "[E]vidence may be presented as to any matter that the court deems relative to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances set forth in section 29-2523. Any such evidence which the court deems to have probative value may be received." In *State v. Holtan*, 197 Neb. 544, 250 N.W.2d 876 (1977), we specifically held that the consideration of mitigating factors or circumstances was not limited by the statute. Evidence in mitigation need only be relevant and probative. The defendant cannot complain of a provision so obviously open ended in the accused's favor.

The defendant's seventh assignment is as follows: "A conviction and sentence in a capital case cannot be sustained unless it appears, beyond a reasonable doubt, that no error in the fact-finding of trial contributed in any way to the jury's determination of guilt." The defendant's argument on this point is so convoluted as to literally make no sense. The defendant has made no claim of error in the factfinding process leading to the determination of guilt. We have examined the record and found none. The defendant was guilty beyond any doubt at all.

The defendant's eighth assignment asserts that the State has the burden of proving beyond a reasonable doubt that no mitigating factor exists. He cites no authority for this proposition. None seems to exist. There is no evidence or claim that the State suppressed any favorable evidence. If there were any mitigating factors other than those shown, the defendant is in the best position to know and reveal those factors.

The death sentence in this case is affirmed.

AFFIRMED

KRIVOSHA, C.J., and WHITE, J., concur in that portion of the opinion affirming the conviction, and

dissent from that portion of the opinion affirming the imposition of the death penalty. We would have sentenced the appellant to be confined for the balance of his natural life.

JAY J. SULLIVAN, APPELLEE, V.
JANET HAJNY, CLAY COUNTY CLERK, ET AL., APPELLEES,
STATE OF NEBRASKA, INTERVENOR-APPELLANT.

315 N.W.2d 443

Filed January 29, 1982. No. 43658.

Mental Health Boards: Public Officers and Employees. A member of a county mental health board appointed under the provisions of Neb. Rev. Stat. § 83-1018 (Reissue 1976) is an "officer of the state or a political subdivision thereof," and, as such, is an employee of the State of Nebraska for the purposes of the Social Security Act as set forth in Neb. Rev. Stat. §§ 68-601 and 68-602(3) (Reissue 1976).

Appeal from the District Court for Clay County: FRED R. IRONS, Judge. Reversed and remanded with directions.

Paul L. Douglas, Attorney General, and Terry R. Schaaf for appellant.

Dan Baird and Jay J. Sullivan for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and HASTINGS, JJ., and RONIN, Retired District Judge.

HASTINGS, J.

The plaintiff, Jay J. Sullivan, an attorney and an appointed member of the Clay County Mental Health Board, filed a petition seeking a declaratory judgment that, as such board member, he is not an employee of Clay County, Nebraska, and therefore should not have had social security deductions made from the warrant drawn for his services. The State of Nebraska was

allowed to intervene in this action in light of its potential liability for the filing of incorrect reports with the Social Security Administration. The District Court found in favor of the plaintiff, ordering that the plaintiff and all other members of the board of mental health are not employees so as to require the withholding of social security tax from payments made for their services. The State of Nebraska has appealed without assignments of error, except to argue that the District Court's decision was wrong. We reverse.

The case was tried on a written stipulation of facts. As a part of that stipulation, it was agreed that the plaintiff had been appointed to serve as a member of the Clay County Mental Health Board by a district judge of that county, under the provisions of Neb. Rev. Stat. §§ 83-1001 to 83-1078 (Reissue 1976); that the Clay County authorities determined that the plaintiff was in fact an employee and did withhold for social security purposes the amount of $10.80 from its warrant dated April 2, 1980, issued to the plaintiff for his services; that the Clay County Board of Supervisors did not hire the plaintiff, exercise no control over his actions, including the amount of time spent by the board of mental health in its deliberations, nor do they set the hourly rate at which the plaintiff or his fellow board members are paid for their services. Section 83-1018 empowers the presiding judge of the District Court to appoint the members of the mental health board for a fixed term of years. Neb. Rev. Stat. § 83-337 (Reissue 1976) directs that such members shall be allowed compensation at an hourly rate to be determined by the district judge.

The dispute in this matter centers on Clay County's attempt to administer the federal Social Security Act in accordance with Neb. Rev. Stat. §§ 68-601 et seq. (Reissue 1976). This act establishes a statewide policy to the effect that "such steps be taken as to provide such protection to employees of the State of Nebraska and its political subdivisions on as broad a basis as is permitted

under the Social Security Act." § 68-601(1). The question then becomes whether members of mental health boards are "employees" of the state or a political subdivision thereof. No definition of "employee" is provided in the Nebraska statutes other than a statement in § 68-602(3) that "Employee shall include an officer of the state or a political subdivision thereof."

The board has been created by the provisions of § 83-1017. "There is hereby created a mental health board for each county in Nebraska. The board shall have the power to issue subpoenas, to administer oaths, and to do any act necessary and proper for the board to carry out its duties." We have previously indicated how the board members are appointed and paid. Each board member is required to take an oath. "Before entering upon the duties of their office, the members of the mental health board shall take and subscribe an oath or affirmation to support the Constitution of the United States and the Constitution of the State of Nebraska, and to faithfully discharge their duties according to law." Neb. Rev. Stat. § 83-318 (Reissue 1976). Chapter 83, article 10, then sets forth in detail the various procedures which the boards of mental health shall follow in carrying out their duties. The board may issue a warrant commanding the sheriff to take the subject into custody. § 83-1028. A summons giving the subject written notice of the time and place of hearing shall be issued on order of the board. § 83-1048. The board shall select the time and place for hearing and is required to close all sessions to the public unless the subject requests otherwise. § 83-1055. At the time of the final hearing, the board shall determine whether there is clear and convincing proof that the subject is a mentally ill dangerous person and, if so, whether less restrictive alternatives for treatment are available. § 83-1035. If the board finds that the evidence is insufficient, the subject shall be discharged. § 83-1036. Otherwise, the board shall make a determination of the treatment and disposition of the subject which is

warranted under the evidence in the case and enter an appropriate order to that effect. §§ 83-1037 to 83-1046. If the subject is found to be indigent, the board shall certify that fact to the district or county court for appointment of counsel. § 83-1049.

Although Sullivan may very well be considered to be an employee under the reasoning of *State of Nebraska v. Finch*, 339 F. Supp. 528 (D. Neb. 1972), we believe that clearly he is "an officer of the state or a political subdivision thereof." § 68-602(3).

"Members of state boards and commissions are generally regarded as public officers." 63 Am. Jur. 2d *Public Officers and Employees* § 22 at 640-41 (1972). Although admittedly constituting dicta as far as the particular point with which we are here concerned, we believe that the following language from *Morrill County v. Bliss*, 125 Neb. 97, 106-07, 249 N.W. 98, 102 (1933), is instructive: "The defendant Bliss was, during a part of the time involved in this case, secretary of the department of trade and commerce of the state of Nebraska, and, as such, an *ex officio* member of the guaranty fund commission. The other defendants were either members of the commission or its agents. The defendants were public officers of the state of Nebraska or their employees. . . . The commission was created by law and appointments to it were made by the governor with the consent of the senate. They were required to take the oath required of county officers, give bond for faithful performance of the duties, and an assessment was levied upon state banks under the police power to pay the expenses and compensation of the commission."

A case widely cited in defining a state officer is *State of Florida ex rel. Clyatt v. Hocker, Judge*, 39 Fla. 477, 22 So. 721 (1897). It has been quoted with approval by the Supreme Court of the State of Florida on many occasions, most recently in *Murphy v. Mack*, 358 So. 2d 822 (Fla. 1978). At issue in *Hocker* was the status of members of the state board of legal examiners, created

by the Legislature and appointed by the Supreme Court. The question presented was whether such legislation violated a constitutional provision which required that all state officers be either appointed by the Governor or elected by the people. In declaring the legislative act unconstitutional because the examiners were indeed state officers, the Florida court spoke in the following terms at 487, 22 So. at 723: "The act in question makes the Board of Legal Examiners created by it the sole and exclusive instrument by and through which this highly important and delicate governmental power is to be exercised, and thereby confers upon them the exercise of governmental functions. The duties it prescribes for them are lasting and continuous, and not merely casual, temporary or incidental, but the place and the duties remain even if the persons appointed to perform them shall die or resign. It prescribes a regular tenure of office with fixed periods when successors are to be appointed; and emoluments are prescribed, parsimonious though they be in amount. The office and the officers are created by governmental authority, for the discharge of legally prescribed public duties, as part of the sovereign power of the State and for the public good."

Sullivan was appointed as a member of the county mental health board under authority created by legislative enactment. He is paid under that same authority by a political subdivision of the state. As such, he is an officer of the state for the purposes of social security benefits and taxes.

The judgment of the District Court is reversed and the cause is remanded with directions to enter judgment in conformity with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.